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In the
Supreme Court of the United States

OCTOBER TERM, 1977

ALBERT SMITH, President of the Village of Skokie, Illinois; JOHN N. MATZER, JR., Village Manager of the Village of Skokie, Illinois; HARVEY SCHWARTZ, Corporation Counsel of the Village of Skokie, Illinois; and the VILLAGE OF SKOKIE, Illinois, a municipal corporation,

Petitioners,

vs.

FRANK COLLIN and the NATIONAL SOCIALIST PARTY OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

PAGE

Opinions Below 2

Jurisdiction 2

Reasons for Granting Certiorari 3

Questions Presented For Review 4

Constitutional Provisions and Village Ordinances 5

Statement of the Case 8

Argument Amplifying Reasons for Allowance of Writ 15

I. THE RULING OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT WAS CONTRARY TO A DECISION OF THE UNITED STATES SUPREME COURT WHICH HAS NEVER BEEN REVERSED 15

II. THE DECISION OF THE COURT OF APPEALS CONTAINS CONCLUSIONS WHICH ARE AT VARIANCE WITH PRINCIPLES OF LAW ENUNCIATED BY THIS COURT IN OTHER CASES 16

III. THE ACTS OF THE VILLAGE AUTHORITIES IN PROHIBITING THE PROPOSED DEMONSTRATION WERE JUSTIFIED BY THE EXISTENCE OF A CLEAR AND PRESENT DANGER OF A SUBSTANTIVE EVIL 17

IV. THE ORDINANCES ARE NOT UNCONSTITUTIONALLY OVERBROAD OR VAGUE 24

PAGE

V. THE CONCEPT OF FREEDOM OF SPEECH IN THE MARKETPLACE OF IDEAS HAS NO APPLICATION TO THE CONDUCT PROHIBITED BY THE SKOKIE ORDINANCES 26

VI. THE PROPOSED DEMONSTRATION IS AN INTENTIONAL INCITEMENT TO RIOT AND A DELIBERATE PROVOCATION WHICH DOES NOT WARRANT FIRST AMENDMENT PROTECTION 31

Conclusion 33

Request for Relief 34

AUTHORITIES CITED

United States Supreme Court:

Beauharnais v. Illinois, 343 U.S. 250 (1952) 3, 5, 15, 23, 25, 26, 30, 33

Brandenburg v. Ohio, 395 U.S. 444 (1969) 28, 31

Cantwell v. Connecticut, 310 U.S. 296 (1940) 29

Carroll v. Princess Anne, 393 U.S. 175 (1968) 19

Cox v. U.S., 394 U.S. 705 (1969) 16, 17

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 29, 32

Cohen v. California, 403 U.S. 15 (1971) 28, 29

Feiner v. New York, 340 U.S. 315 (1951) 31

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 27

Gregory v. Chicago, 394 U.S. 111 (1969) 24

Kunz v. New York, 340 U.S. 290 (1951) 33

Schenck v. U.S., 249 U.S. 47 (1919) 18

Terminiello v. Chicago, 337 U.S. 1 (1949) 28

PAGE

Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969) 28, 29

U.S. v. O'Brien, 391 U.S. 367 (1948) 16, 17

Whitney v. California, 294 U.S. 357 (1927) 28

Watts v. U.S., 394 U.S. 705 (1969) 16

Young v. American Mini Theatre, 427 U.S. 50 (1977) 26

United States Court of Appeals:

Augustus v. School Board of Escambia, Fla., 507 F.2d 152 (1975) 19

Jordon v. Gilligan, 50 F.2d 701 (1974) 16

McCray v. Burrell, 516 F.2d 357 (1975) 16

Mitchell v. Archibald & Kendall, Inc. No. 77-2216 7th Circuit Court of Appeals 32

Smith v. U.S. 502 F.2d 512 (1974) 19

United States v. Chase, 281 F.2d 225 (1960) 15

State Decisions:

Chicago Real Estate Board v. City of Chicago, 224 N.E.2d 793 (1967) 21

Contreras v. Crown Zellerbach Corp., Wash., 565 P2d 1173 (1977) 20

Knierim v. Izzo, 22 Ill.2d 73 (1961) 21

People v. C. Betts Realtors, Inc., 361 N.E.2d 585 (1977) 25

Public Finance Corp. v. Davis, 66 Ill. 2d 85 (1976) 21

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No.

ALBERT SMITH, President of the Village of Skokie, Illinois; JOHN N. MATZER, JR., Village Manager of the Village of Skokie, Illinois; HARVEY SCHWARTZ, Corporation Counsel of the Village of Skokie, Illinois; and the VILLAGE OF SKOKIE, Illinois, a municipal corporation,

Petitioners,

vs.

FRANK COLLIN and the NATIONAL SOCIALIST PARTY OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Pursuant to Supreme Court Rule 19, Albert Smith, President of the Village of Skokie, Illinois; John N. Matzer, Jr., Village Manager, Harvey Schwartz, Corporation Counsel, and the Village of Skokie, Illinois, a municipal corporation, who are defendants in this case, file this petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, which affirmed the judgment of the United States District Court for the Northern District of Illinois.

OPINIONS BELOW

The opinions of the United States District Court and the United States Court of Appeals are not as yet reported. The opinion of the United States District Court is set forth in a separate appendix, as Appendix A. The opinion of the United States Court of Appeals is set forth as Appendix B in the separate appendix.

GROUNDS ON WHICH JURISDICTION OF SUPREME COURT IS INVOKED

The judgment sought to be reviewed herein was decided on May 22, 1978 and entered on the same date. No petition for rehearing has been filed.

The statutory provision which confers on this Court jurisdiction to review the judgment in question by writ of certiorari is Section 1254(1) of the United States Code.

REASONS FOR GRANTING CERTIORARI

This case is of sufficient importance to warrant final determination by the highest court of the United States of America.

The national and international attention which this case has attracted does not result from sensationalism or morbid curiosity, but rather from the issues involved which have engendered concerns shared by thoughtful men and women everywhere. The heightened consciousness and perception of American Jews as a result of the Nazi Holocaust and the juxtaposition of their 14th Amendment rights against the 1st Amendment rights of the American National Socialist (Nazi) Party presents a uniquely new circumstance for which existing precedent is insufficient.

The opinions of the lower courts have extrapolated from a wide variety of cases ranging from those involving the outlawing of criminal syndicalism laws, to the right of the New York Times to publish government information, to fighting words addressed to individuals, to individual libel suits, to obscene expressions of opposition to the Viet Nam war. The petitioners have asserted the validity of many decisions of this Court to justify their contention that the constitutional rights of citizens of the Village of Skokie would be infringed by Village action (e.g. granting a permit) which woule result in inflicting emotional suffering upon them.

Other reasons for granting certiorari are as follows:

1. The decision below is in conflict with this Court's ruling in *Beauharnais* v. *Illinois*, 343 U.S. 250 (1952).
2. The opinion of the Court of Appeals contains conclusions which are at variance with principles of law enunciated by this Court in other cases.

3. The acts of the Village authorities in prohibiting the proposed demonstration were justified by the existence of a clear and present danger of a substantive evil.
4. The ordinances are not unconstitutionally overbroad or vague.
5. The concept of freedom of speech in the marketplace of ideas has no application to the conduct prohibited by the Skokie ordinances.
6. The proposed demonstration is an intentional incitement to riot and a deliberate provocation which does not warrant 1st Amendment protection.

All of these matters warrant comprehensive consideration and resolution by the United States Supreme Court.

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are:

1. Can an Illinois municipality, possessing sovereign state powers, deny a permit for a public demonstration if it involves acts which portray criminality, depravity or lack of virtue in a person or group of persons by reference to racial, religious, or ethnic affiliation?

2. Can such a municipality prohibit the dissemination of materials which promote and incite hatred against persons by reason of their race, national origin or religion and is intended to do so?

3. Was the denial of permission to the plaintiffs to conduct a public demonstration a violation of their constitutional rights?

4. Given the ethnic and religious composition of the Village of Skokie, is a public demonstration by professed Nazis in storm trooper uniform with swastika a deliberate

provocation and an intentional incitement to riot which does not merit 1st Amendment protection?

5. Was the ruling of the United States Court of Appeals contrary to the United States Supreme Court decision in *Beauharnais* v. *Illinois*, 343 U.S. 250 (1952)?

6. Would the granting of a permit for the proposed demonstration by the Village of Skokie deprive those citizens of the Village who are Jewish and more particularly those naturalized Jewish citizens who are survivors of the Holocaust, of rights guaranteed to them under Section 1 of the 14th Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS AND VILLAGE ORDINANCES INVOLVED

These are:

(1) The 1st Amendment to the Constitution of the United States, as follows:

> Freedom of religion, speech and press; peaceful assemblage; petition of grievances
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

(2) Section 1 of the 14th Amendment to the Constitution of the United States, as follows:

> §1. Citizenship rights not to be abridged by states
>
> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce

any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(3) Skokie Village Ordinance No. 77-5-N-994 entitled "AN ORDINANCE RELATING TO PARADES AND PUBLIC ASSEMBLIES." The relevant portions of this ordinance are the following:

Section 27-51. Permit Required. No parade, public assembly or similar activity, where the number of participants expected may reasonably be assumed to exceed fifty (50) or more persons, and/or vehicles is permitted on any street or area of the Village unless a permit allowing such activity has been obtained from the Village Manager, or upon referral, to the President and Board of Trustees; provided, however, that this Ordinance shall not apply to students going to and from school classes, or participating in educational activities under the immediate direction and supervision of school authorities or a governmental agency acting within the scope of its functions, nor shall a permit be required for normal or scheduled activities of the Village.

Section 27-56. Standards for Issuance.

b) The activity will not create an imminent danger of a substantial breach of the peace, riot, or similar disorder.

c) The conduct of the parade, public assembly, or similar activity will not portray criminality, depravity or lack of virtue in, or incite violence, hatred, abuse or hostility toward a person or group of persons by reason of reference to religious, racial, ethnic, national or regional affiliation.

This ordinance in its entirety is set forth in a separate appendix to this petition as Appendix C.

(4) Skokie Village Ordinance No. 77-5-N-995 entitled "AN ORDINANCE PROHIBITING THE DISSEMINATION OF MATERIALS WHICH PROMOTE AND INCITE GROUP HATRED."

The relevant portions of this ordinance are: Sections 28-43, 28-43.1 and 28-43.2.

Sec. 28-43 Prohibition of materials promoting or inciting group hatred.

Sec. 28-43.1 The dissemination of any materials within the Village of Skokie which promotes and incites hatred against persons by reason of their race, national origin, or religion, and is intended to do so, is hereby prohibited.

Sec. 28-43.2 The phrase "dissemination of materials" includes but is not limited to publication or display or distribution of posters, signs, handbills, or writings and public display of markings and clothing of symbolic significance.

This ordinance in its entirety is set forth in a separate appendix to this petition as Appendix D.

(5) Skokie Village Ordinance No. 77-5-N-996 entitled "AN ORDINANCE PROHIBITING DEMONSTRATIONS BY MEMBERS OF POLITICAL PARTIES WEARING MILITARY-STYLE UNIFORMS."

The relevant portions of this ordinance are: Sections 28-42.1 and 28-42.2.

Sec. 28-42.1 No person shall engage in any march, walk or public demonstration as a member or on behalf of any political party while wearing a military-style uniform.

Sec. 28-42.2 "Political party" is hereby defined as an organization existing primarily to influence and deal with the structure or affairs of government, politics or the state.

This ordinance in its entirety is set forth in a separate appendix to this petition as Appendix E.

STATEMENT OF THE CASE

A. JURISDICTIONAL SUMMARY

The trial court found that it had jurisdiction over this case under the provisions of Title 42, Section 1983 and Title 28, Section 1343(3) of the United States Code.

B. THE PARTIES

The plaintiffs are Frank Collin, leader of the National Socialist Party of America, and the National Socialist Party of America. The defendants are Albert J. Smith, Skokie Village President; John N. Matzer, Jr., Skokie Village Manager; Harvey Schwartz, Skokie Corporation Counsel; and the Village of Skokie.

C. THE PROCEEDINGS

The plaintiffs filed a complaint against the defendants asking that specified ordinances enacted by the defendant Village be declared void and that an injunction issue against their enforcement.

They alleged that they had been refused a permit to conduct a parade within the Village of Skokie based upon their inability to meet the conditions of these ordinances and that the ordinances imposed criminal sanctions upon them in the event of their conducting their demonstration.

The District Court, after hearing the evidence, held all three ordinances to be facially invalid. The Court re-

strained the enforcement of those portions of the "Permit" ordinance referred to above, and restrained the enforcement of the "Military Style Uniforms" ordinance.

The United States Court of Appeals for the Seventh Circuit affirmed the decision of the District Court.

D. STATEMENT OF THE FACTS

The defendant Village of Skokie generally adjoins the northwest portion of the City of Chicago. In 1974, its population was approximately 70,000 persons of whom 40,500 were Jewish. Other racial and ethnic groups within the Village include Blacks, Indians, Japanese, Chinese and Filipino. Some 1970 Census figures pertaining to Skokie are:

Persons who migrated to the U.S. between 1945 and 1970	3,340
Foreign born, who indicated Yiddish to be their mother tongue	1,758
Native born who indicated Yiddish to be their mother tongue	9,212
Number of persons whose country of origin is Poland	3,819
Number of persons whose country of origin is U.S.S.R.	8,075

The total number of Jewish survivors of World War II and their families is approximately 7,000 persons.

The Village has an established policy of integrated housing and fair employment and is committed to providing subsidized housing on a completely non-discriminatory basis. It has experienced some racial and religious disturbances in the past and has a Human Relations Commission to deal with these problems.

The northeastern quadrant of the Village adjoins a portion of Evanston which contains a large Black population. During recent years, Blacks and other minority persons have been peacefully integrated into the Village.

The National Socialist Party of America was described by its leader, plaintiff Frank Collin, as a "Nazi organization." (Tr.P. 4)

Mr. Collin described the uniform of the National Socialist Party of America, as follows:

> ". . . We wear brown shirts with a dark brown tie, a swastika pin on the tie, a leather shoulder strap, a black belt with buckle, dark brown trousers, black engineer boots, and either a steel helmet or a cloth cap, depending upon the situation, plus a swastika arm band on the left arm and an American flag patch on the right arm." (Tr.P. 27)

The policy of the National Socialist Party of America with regard to Jews is:

> ". . . Basically we believe that the Jews are in the forefront of the International Communist Revolution and that they have inordinate amounts of political and financial power in the United States and throughout the world.
>
> ". . .Jewish involvement in Communism and in the Federal Reserve conspiracy should be exposed and documented and presented to the American public for their own conclusions." (Tr.P. 28-29)

Mr. Collin gave the views of the National Socialist Party of America with respect to Black Americans, as follows:

> ". . . We believe, . . ., that the Negro race is biologically inferior to the white Aryan race." (Tr.P. 13)

The stated policy of the Party with respect to Black Americans, is as follows:

> ". . . We believe . . ., that the Negroes should be repatriated to their African homeland, as quickly as possible." (Tr.P. 15)

Defendants' Exhibit 9 is a publication by the National Socialist Party of America entitled "WE ARE COMING!", which contains the following statements: "Where one finds the most Jews, there also shall one find the most Jew-haters. With this basic truth in mind, we are now planning a number of street demonstrations and even speeches in Evanston, Skokie, Lincolnwood, North Shore, Morton Grove, etc. . . ." The back page of this exhibit contains a figure with a hand clutched at its throat and the words "SMASH THE JEW SYSTEM!"

Sol Goldstein, a Skokie resident and resident of Kovno, Lithuania on Sunday, June 22, 1941, gave the following testimony on the trial of the cause:

The 501 Program

> ". . . It was then the S.A. people came and asked for 501 college graduates, intellectuals, for special work for the German authorities, men only . . . They got the 501 and they took them away and the next day we got a report from one or two who had escaped that they were killed the same day that they took them away."

The Left and Right Pairing

> ". . . On October 28 on the square that was called the Democrat Square all of the Jewish people were ordered at 6:00 o'clock in the morning, to appear

and to be lined up by families. Anyone to be found in his home will be shot to death. . . .

". . . Then came the S.A. Their leader was Mr. Jodl, with a yellow uniform, with a swastika. He reviewed the whole thing and started to segregate, "You go to the left. You go to the right. You go to the left, you go to the right.'

". . . It took a whole day long like this. Some families were split, some families went together and some did not. Thirteen thousand went to the right and . . . fifteen thousand went to the left. I was between the 15,000, without knowing whether this was better or worse . . .

" . . In the morning, a few people who came back to the ghetto who escaped . . . informed us that . . . about six kilometers away from Kovno, all of these 13,000 were told to undress themselves, to give away all of their belongings and they were shot to death.
". . . After two or three days later the German Gestapo brought their clothing to the ghetto . . .
". . . So, in October 28th, 29, out of the 45,000 got left only 15,000 over."

The Children's Action

". . . The German authorities ordered that the Jewish people have to give away to them all of the children that cannot go to work according to their law. I believe it was up to the age of 11 or 12. . . . Mothers, came whose infant they grabbed from her arms, the children, the infants, and threw them—threw them in the vans like packages and took them away, and this was the Children's Action, and they killed them, too . . ."

Q. "What does that uniform and swastika mean to you?"

A. "Death in a most terrible form; not only death to be shot in a moment to be killed but death after torture."

David Gutmann, Ph.D., Professor of Psychology in the Northwestern University Medical School and Chief of the Psychology Division in the University's Department of Psychiatry and Behavioral Science, gave the following testimony:

"When individuals and/or the group with which they are affiliated have been subjected to severe and repeated traumatic experiences, these individuals will be prone to respond to any reminders of their persecution in a total fashion, as if they were again subjected to the totality of noxious conditions under which their painful associations were originally formed."

"No matter what words their placards bear, when Nazis march in Skokie, their presence and their regalia says to Jews: 'You thought you escaped. You did not. We know where you are. When our strength is sufficient and when the time is ripe, we will come and get you.' "

On May 2, 1977, the Village of Skokie enacted three ordinances, namely:

Village Ordinance No. 77-5-N-994 entitled, "AN ORDINANCE RELATING TO PARADES AND PUBLIC ASSEMBLIES."

Village Ordinance No. 77-5-N-995 entitled, "AN ORDINANCE PROHIBITING THE DISSEMINATION OF MATERIALS WHICH PROMOTE AND INCITE GROUP HATRED."

Village Ordinance No. 77-5-N-996 entitled, "AN ORDINANCE PROHIBITING DEMONSTRATIONS

BY MEMBERS OF POLITICAL PARTIES WEARING MILITARY-STYLE UNIFORMS."

Ordinance #994 is a comprehensive permit system for all parades or public assemblies of more than 50 persons anywhere within Skokie. It requires all permit applicants to obtain $300,000 in liability insurance and $50,000 in property damage insurance. Ordinance #995 prohibits the dissemination of material which incites racial or religious hatred, with intent to incite such hatred. Ordinance #996 prohibits public demonstrations by members of political parties while wearing military-style uniforms.

On June 22, 1977, Collin applied for and was denied a permit under #994. The application recited that the proposed public assembly would take place on July 4, would consist of 30 to 50 people demonstrating in front of the Village Hall, would last about a half hour, and would not disrupt traffic. It stated further that the participants would wear uniforms including swastikas and carry placards carrying statements such as "White Free Speech", "Free Speech for the White Man", and "Free Speech for White Americans", but would not distribute handbills or literature.

The street where the Village Hall is located is commercially zoned. It is adjoined by residential areas to the north, south and west. The front of the Village Hall is clearly visible from dwelling units in the adjoining areas.

Evidence was presented at the trial with respect to the impact of acts prohibited by the ordinances upon Jews, generally, upon Jewish survivors of World War II and upon Polish Americans, Japanese Americans and Latin Americans.

ARGUMENT AMPLIFYING REASONS FOR ALLOWANCE OF WRIT

POINT I

THE RULING OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT WAS CONTRARY TO A DECISION OF THE UNITED STATES SUPREME COURT WHICH HAS NEVER BEEN REVERSED.

In *Beauharnais* v. *Illinois*, 343 U.S. 250 (1952), the United States Supreme Court sustained an Illinois statute containing the following language:

> "It shall be unlawful for any person, firm or corporattion to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots . . ."

The *Beauharnais* case has never been overruled or qualified by the Supreme Court of the United States.

In *United States* v. *Chase*, 281 F.2d 225 (1960), this Court said:

> "The Rogers case was a five to three decision. It has been frequently criticized. It is extremely doubtful that the holding in Rogers would be followed by the present Supreme Court. Nevertheless, if the Rogers decision is applicable to the situation before us, we must follow that decision, at least until such time as the Supreme Court may overrule it."

The United States Court of Appeals for the 4th and 6th Circuit have followed the same principle.

In *McCray* v. *Burrell,* 516 F.2d 357 (1975), the United States Court of Appeals for the 4th Circuit said:

> ". . . It is inappropriate to consider the policy considerations which might dictate a different course of decision. They must be addressed to the Supreme Court, which alone can overrule its prior decision . . . Our duty is clear: We must follow the Supreme Court, not attempt to lead it . . ."

Jordon v. *Gilligan,* 500 F.2d 701 (1974) involves a decision by the 6th Circuit Court. In that case the Court said:

> "Decisions of the United States Supreme Court rendered by written opinions are binding on all courts, state and federal. The Court's holding is stare decisis and cannot be overruled except by the Court itself. Even the Court's dicta is of persuasive precedential value . . ."

POINT II

THE DECISION OF THE COURT OF APPEALS CONTAINS CONCLUSIONS WHICH ARE AT VARIANCE WITH PRINCIPLES OF LAW ENUNCIATED BY THIS COURT IN OTHER CASES.

The cases at variance with the opinion of the Circuit Court of Appeals are *Watts* v. *U.S.,* 394 U.S. 705 (1969); *U.S.* v. *O'Brien,* 391 U.S. 367 (1948); and *Cox* v. *Louisiana,* 379 U.S. 559 (1965).

In *Watts,* at page 707, this Court said, "What is a threat must be distinguished from what is constitutionally protected speech." The existence of a threat is amply established by evidence in the record.

In *U.S.* v. *O'Brien,* at page 376 of Volume 391, the Court said, "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." The opinion of the Court of Appeals gave to the proposed demonstration the full protection of "speech" without distinguishing it from conduct.

To the same effect is *Cox,* which states as follows, "Picketing, though it may be utilized to communicate ideas, is not speech and therefore is not of itself protected by the 1st Amendment."

POINT III

THE ACTS OF THE VILLAGE AUTHORITIES IN PROHIBITING THE PROPOSED DEMONSTRATION WERE JUSTIFIED BY THE EXISTENCE OF A CLEAR AND PRESENT DANGER OF A SUBSTANTIVE EVIL.

There are two congruent circumstances in this case which take it outside of the scope of all authorities. The first is the historical reality of genocide within recent memory—the systematic, calculated extermination of six million Jews under the aegis of the swastika. The second is the special characteristics of Skokie's seventy thousand residents—approximately 40,500 of Jewish ancestry or religion, including thousands of the closest relatives of Holocaust victims and hundreds of survivors.

The evidence in the record challenges Defendant Collin's testimony that the purpose of his demonstration was to protest the Park District's denial of a permit. Collin accepted full responsibility for the preparation and distribution of a pamphlet to his followers which contained the following language:

> "We will march in Skokie because where there are the most Jews, there are the most Jew haters . . ."

Whatever his avowed purpose may have been, his proposed appearance with the swastika in front of the Village Hall in Skokie was intended by him to be observed there by the general public, those who happened to be passing by and those who would be attracted to his demonstration.

Given Skokie's unique population mix, and discounting the special concern of the Jewish population, sixty per cent of the general public to whom the defendant's "message" was intended to be delivered would be Jewish. Of this percentage, ten or fifteen percent would be Jews who were close relatives of deceased Holocaust victims, and many others would be Holocaust survivors.

The classic formulation of the "fire in a crowded theatre" doctrine was by Mr. Justice Holmes in *Schenck* v. *U.S.*, 249 U.S. 47 (1919) at page 52:

> We admit that in many places and in ordinary times the Defendants . . . would have been within their constitutional rights. *But the character of every act depends upon the circumstances in which it is done* . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a crowded theatre and causing panic. *It does not even protect a man from an injunction against uttering words that may have all the effect of force* . . . The question in every case is whether the words used are used in such circumstances as to create a clear and present danger that they will bring about the substantive evil that Congress has a right to prevent: *It is a question of proximity and degree.*" (Emphasis supplied)

There are many cases in which otherwise lawful expression of ideas was considered unlawful because of the circumstances in which the ideas would be expressed. In *Smith* v. *U.S.*, 502 F.2d 512 (1974), the judges of the Fifth Circuit affirmed the discharge of a staff psychologist for wearing a peace symbol in a veterans hospital:

> "We commence our analysis of the issues with a deep consciousness of the constitutional guaranty of free speech . . . In our consideration of the issue, *we must look to the place, time and circumstances disclosed by the record as well as the type of conduct involved* in striking the delicate balance necessary between the legitimate interests of the government and the constitutional rights of the appellant . . ." (502 F.2d, at page 514.) (Emphasis supplied)

Augustus v. *School Board of Escambia, Florida*, 507 F.2d 152 (1975) enunciated a similar opinion. The Court upheld an injunction against display of a Confederate flag in a high school and said (page 156):

> "An established exception to the First Amendment rights of students occurs . . . in cases where the exercise of that right causes violence and disruption in the educational process."

Carroll v. *Princess Anne*, 393 U.S. 175 (1968), involved a ten-day restraining order issued *ex parte* against a white supremacy group which was abusively anti-Black and anti-Jew. The thrust of the opinion involved the *ex parte* nature of the order. In *Carroll*, the Court said:

> "We do not here challenge the principle that there are special limited circumstances in which speech is so interlaced with burgeoning evils that it is not protected by the broad guaranty of the First Amendment."

In the course of the last twenty-five years, there have been two parallel developments in law which point to the validity of the ordinances. The first of these developments is the articulation by the Courts of the concept that mental suffering is in itself a basis for awarding relief in tort. Upon trial of this cause, the petitioners have established (1) that racial or ethnic taunts, epithets and slurs inflict psychic traumas upon individuals who are members of the defamed group and particularly upon such individuals who have been sensitized by exposure to discrimination and oppression; (2) that the Village of Skokie contains an unusual number of such individuals; and (3) that the public utterances of such defamatory materials creates an atmosphere of permissiveness among those in the population already predisposed to agree with the defamation and reenforces their latent hostilities.

In *Contreras* v. *Crown Zellerbach Corp.*, Wash., 565 P.2d 1173 (1977), the Supreme Court of Washington sustained a complaint based upon the "tort of outrage." In that case, the plaintiff claimed relief because of his exposure to scorn and ridicule solely by reason of his Mexican nationality. The language of the opinion is particularly relevant to the evil to which the Skokie ordinances are addressed:

> "As we as a nation of immigrants become more aware of the need for pride in our diverse backgrounds, racial epithets which were once part of common usage may not now be looked upon as "mere insulting language." Changing sensitivity in society alters the acceptability of former terms. It is noted in *Alcorn* v. *Anbro Engineering, Inc., supra* . . . 468 P. 219: "Although the slang epithet 'nigger' may once have been in common usage, along with such other racial characterizations as 'wop,' 'chink,' 'jap,' 'bohunk,' or 'shanty Irish,' the former expression has become particularly abusive and insulting in light of recent developments in the civil rights movement as it pertains to the American Negro. Nor can we accept defendants' contention that plaintiff, as a truckdriver must have become accustomed to such abusive language. Plaintiff's own susceptibility to racial slurs and other discriminatory conduct is a question for the trier of fact, and cannot be determined on demurrer." The same conclusion is compelled with regard to Mexican-Americans and the various slang epithets that may have once been in common usage regarding them. It is for the trier of fact to determine, taking into account changing social conditions and plaintiff's own susceptibility, whether the particular conduct was sufficient to constitute extreme outrage."

In Illinois the courts have recognized that the intentional infliction of mental suffering is compensable in a suit for damages. The history and development of this concept is outlined in *Public Finance Corp.* v. *Davis*, 66 Ill.2d 85 (1976), and in *Knierim* v. *Izzo*, 22 Ill.2d 73 (1961). The attention of this court is called to the following quotation from *Knierim*:

> "We conclude that peace of mind is an interest of sufficient importance to receive protection from the law against intentional invasion of the kind here involved."

The following quotation from *Chicago Real Estate Board* v. *City of Chicago*, 224 N.E.2d 793 (1967), is appropriate:

> "Where speech is an integral part of unlawful conduct, it has no constitutional protection. (*Giboney* v. *Empire Storage and Ice Co.*, 336 U.S. 490, 498, 69 S.Ct. 684, 93 L.Ed. 834.) More particularly, restrictions on speech against racial and religious groups have been sustained by the United States Supreme

> Court. (*Beauharnais* v. *People of the State of Illinois,* 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919.) In the Beauharnais case the court held that an Illinois law curbing racial and religious propaganda that tended to incite breaches of the peace did not infringe freedom-of-speech guarantees. The court reasoned that in the face of the history of racial violence and accompanying extreme racial and religious propaganda, the Illinois legislature was not without reason in seeking to curb such defamatory propaganda, and that under the circumstances it was not necessary to consider the "clear and present danger" concept."

Along with the development of the concept of compensation for mental suffering or invasion of peace of mind, there has been a progression of legal and social events with respect to the extension of constitutional guarantees to persons deprived of them by reason of their racial or ethnic origin.

The extension of freedom of opportunity to persons, irrespective of race or ethnic origin has been held to be of sufficient importance to warrant unprecedented curbing of the right of free speech. Real estate brokers are prohibited from distributing leaflets which, while they do not defame persons by reason of their background, nevertheless serve to implant or inflame fears that the sale of property to Blacks will diminish property values, as will be noted from the following excerpts from the opinion of the Illinois Supreme Court in the *Chicago Real Estate Board* case, *supra*:

> "The controversial provision of the Fair Housing Ordinance, attacked as a violation of freedom of speech guarantees, was designed to strike at the practice of "panic peddling," which is condemned by all parties to this litigation. That device, whereby owners are induced to part with their property by implanting or inflaming fears that property values will diminish because Negroes are, or may become, residents, not only defames a group, but is a technique used by some real-estate brokers to perpetuate segregated housing. *As such, it is a handmaiden of the other discriminatory practices declared unlawful in this ordinance, and it is not entitled to constitutional protection.*" (Emphasis added)

The Village of Skokie has a Fair Housing Ordinance similar to the one tested in *Chicago Real Estate Board, supra.* It has a well established policy of preserving the right of all citizens, irrespective of their ancestry, color or creed, to share in all of the benefits of citizenship on a de facto as well as de jure basis. The Village strongly asserts that the public dissemination of racially defamatory and hatred inciting materials is inimical to this policy and is "the handmaiden of other discriminatory practices."

There is no constitutional right to perform an act which inflicts injuries upon another and the Village has the right to intervene if it considers such injuries to be of sufficient consequence. Acting under the Constitution of Illinois as a Home Rule unit and a uniquely sovereign body, the Village Trustees have the right to determine whether or not this evil exists and to take appropriate steps to protect the Village and its citizens from it.

The substantive evil of the conduct prohibited by the ordinances is clearly recognized in *Beauharnais* v. *Illinois, supra.*

> "Illinois did not have to look beyond her own borders or await the tragic experience of the last three decades to conclude that wilful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjust-

> ments required for free, ordered life in a metropolitan, polyglot community. From the murder of the abolitionist Lovejoy in 1837 to the Cicero riots of 1951, Illinois has been the scene of exacerbated tension between races, often flaring into violence and destruction. In many of these outbreaks, utterances of the character here in question, so the Illinois legislature could conclude, played a significant part."

In *Gregory* v. *Chicago,* 394 U.S. 111 (1969), the Court reversed a disorderly conduct conviction against Dick Gregory, whose demonstration became disorderly only because of the audience reaction to it. An interesting aspect of the case is the special opinion by Mr. Justice Black, a staunch supporter of First Amendment rights:

> "In agreeing to the reversal of these convictions, however, I wish once more to say that I think our federal Constitution does not render the states powerless to regulate the conduct of demonstrators and picketers, conduct which is more than 'speech', more than 'press', more than 'assembly', and more than 'petition'."

Petitioners respectfully submit that the proposed demonstration of the defendants in Skokie with swastika is "more than speech", "more than petition", just as Genocide is more than murder. The assault upon Jews by evoking the bitter memory of mother, father, children, brothers and sisters slaughtered under the swastika is unprecedented.

POINT IV

THE ORDINANCES ARE NOT UNCONSTITUTIONALLY OVERBROAD OR VAGUE.

The proscribed conduct is set forth in two ordinances which were enacted on the same date. The first is ordinance No. 994, which refers to acts which ". . . portray criminality, depravity or lack of virtue in . . . a person or group of persons by reason of reference to racial, religious, ethnic affiliation." Immediately following the enactment of ordinance No. 994, the Village Board enacted ordinance No. 995 which prohibits the dissemination of materials within the Village of Skokie which ". . . promotes and incites hatred of persons by reason of their race . . ."

It is a rule of statutory interpretation that legislative enactments dealing with the same subject matter and enacted at the same time are to be construed together in determining legislative intent.

The ordinances, construed together, fully meet the standard set forth in *People* v. *C. Betts Realtors, Inc.,* 361 N.E. 2d 585 (1977), as follows:

> "A statute is fatally vague only when it exposes a potential actor to some risk or detriment without giving him fair warning of the nature of the proscribed conduct."

The "actor" who would parade or publicly demonstrate in the Village of Skokie has no problem in determining from the ordinances what he can or cannot do. There is no esoteric or mysterious concept involved in the portrayal of depravity or criminality in persons of a given ethnic or racial origin.

The ordinance which prohibits dissemination of materials inciting group hatred requires a specific intention to do so and specifically relates to the distribution of posters, signs, handbills and public display of markings and clothing of symbolic significance.

As stated by Mr. Justice Frankfurter in *Beauharnais* (supra):

> "It is a law specifically directed at a defined evil, its language drawing from history and practice in Illinois and in more than a score of other jurisdictions a meaning confirmed by the Supreme Court of that State in upholding this conviction. We do not, therefore, parse the statute as grammarians or treat it as an abstract exercise in lexicography. We read it in the animating context of well-defined usage, *Nash* v. *United States*, 229 U.S. 373, and State court construction which determines its meaning for us. *Cox* v. *New Hampshire*, 312 U.S. 569; *Chaplinsky* v. *New Hampshire*, 315 U.S. 568."

Certainly the ordinances meet the standard set forth by Mr. Justice Stevens in *Young* v. *American Mini Theatres*, 427 U.S. 50 (1977) (at page 61) in that they are "readily subject to a narrowing construction by the state courts."

POINT V

THE CONCEPT OF FREEDOM OF SPEECH IN THE MARKETPLACE OF IDEAS HAS NO APPLICATION TO THE CONDUCT PROHIBITED BY THE SKOKIE ORDINANCES.

The 7th Circuit Court of Appeals affirmed the right of plaintiffs to publicly espouse their ideas and opinions within the Village of Skokie, presumably even those pertaining to Genocide. This position does not meet the question of intentionally false and defamatory statements.

The portrayal of criminality or depravity in a person or group of persons by reason of their parentage is a falsehood. Persons are simply not criminal or depraved by the circumstances of their birth, and to say or imply otherwise is to utter a lie. When, in addition, such statements are intentionally designed to incite hatred against persons by reason of their parentage, then they do not warrant constitutional protection.

In *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court said:

> "We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. *New York Times* v. *Sullivan*, 376 U.S., at 270. They belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942)."

It is certainly true that everyone has a right to his opinion, even those opinions that are the most repulsive, and one may add to it the right to express such opinions openly and publicly and be protected by the First Amendment. However, deliberately false statements are not protected. Everyone has the right to sell a product, but false statements concerning its efficacy are prohibited. Candidates have the right to express their views publicly on all issues, but unfair campaign practices consisting of false statements are prohibited.

That type of lie which attributes evil to a person by reason of its parentage is particularly devastating. The racial taunt is not an idea but a blow. Its harm occurs when the blow is struck. It is unanswerable. It expresses no idea other than that of death, destruction, hatred, viciousness, discrimination or abuse. It is totally lacking in social content.

The Village is not attempting to censor books or to inhibit the dissemination of ideas, even those which it finds hateful. Rather, it is attempting to prevent the direct racial or ethnic lie, the type of outrageous conduct whch inflicts harm immediately upon utterance and is socially destructive for that reason.

The trial court and the Court of Appeals discussed *Terminiello* v. *Chicago,* 337 U.S. 1 (1949); *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969); *Tinker* v. *Des Moines Independent School District,* 393 U.S. 503 (1969); and *Cohen* v. *California,* 403 U.S. 15 (1971).

The *Brandenburg* case is indeed very significant in the development of constitutiional law in the United States. Its effect was to invalidate a wide array of criminal syndicalist laws under which members of organizations were punished because of their advocacy of unlawful actions. By reversing *Whitney* v. *California,* 274 U.S. 357 (1927); the *Brandenburg* opinion very effectively put the quietus upon laws which punished persons for mere advocacy. The *Terminiello* case applied to another wide selection of ordinances and statutes which made a speaker's conduct unlawful if it "stirs the public to anger, invites dispute, brings about unrest, or creates a disturbance."

The Skokie ordinances fall in neither of these two categories.

The conduct prohibited by the Skokie ordinances is by its nature inherently productive of violence and disorder. This, together with its emotional assault and libelous, defamatory content and intentional provocation and incitement to riot is a part of the substantive evil which the Village had a right to prohibit.

Cohen and *Tinker* involve expressions of opposition to the Viet Nam war. In *Cohen* the opposition was expressed by the sign: "Fuck the draft" and in *Tinker* it was expressed by a black arm band. The U.S. Supreme Court found both expressions of opinion to be permissible. The four letter word which might be offensive to some was not directed to any particular individual or group of individuals. The arm band, as a political protest, was an expression of an idea which abused no one by reason of his race, religion or ethnic background. Neither of these cases have anything to do with the subject matter or the ordinances in Skokie.

Constitutional protection has never been given to fighting words or words which by their very utterance inflict harm or provoke an immediate hostile reaction. *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940); *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942). The language of the Skokie ordinance is, if not directly within the concept of "fighting words", at least sufficiently similar in concept to warrant the same immunity from constitutional attack.

The defendants share the trial court's concern that the prohibition of evil ideas may create a precedent that could stifle the democratic process. The unasked question is where to draw the line and the corrollary is whether it should ever be drawn at all. Such a concern might be warranted if the position of the Village of Skokie was based solely upon the unpopularity of the plaintiff's conduct and the abhorrence of its citizens to it. However, the false and defamatory implication of evil to persons by reason of their parentage is specific and the emotional suffering which such conduct would inflict is peculiar to Skokie's residents.

The Skokie ordinances, in effect, would ban the intentional incitation of hatred against a person by falsely portraying the group to which he belongs because of his parentage, as depraved or evil. It is an affront to the judicial system to suggest that the affirmation of this principle could serve as a precedent for the suppression of other unpopular or repugnant ideas.

In *Beauharnais* v. *Illinois,* (supra), the Court said, at page 263:

> "We are warned that the choice open to the Illinois legislature here may be abused, that the law may be discriminatorily enforced; prohibiting libel of a creed or of a racial group, we are told, is but a step from prohibiting libel of a political party. Every power may be abused, but the possibility of abuse is a poor reason for denying Illinois the power to adopt measures against criminal libels sanctioned by centuries of Anglo-American law. 'While this Court sits' it retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel. Of course discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled."

Petitioners accept the time hallowed concept that all ideas should compete in the marketplace to the end that the good will eventually prevail over the bad. Accepting this philosophy does not mean that the marketplace itself should be unregulated for the public good. In the commercial field, intelligent and reasonable regulation, far from preventing competition, can serve to stimulate and promote it. In the marketplace of ideas, regulation can have a similar result.

Falsehoods intentionally designed to incite racial, national and religious hatreds do not promote competition of ideas in the marketplace, but, on the other hand, obscure and degrade them. The portrayal of criminality or depravity by reason of race, religion or origin carries the **implication of evil in members of a group solely because** of their parentage. This is a monstrous, blatant, unmitigated lie. It deserves no more protection in the marketplace of ideas than would a nationwide TV broadcast advertising a false miracle cancer drug.

POINT VI

THE PROPOSED DEMONSTRATION IS AN INTENTIONAL INCITEMENT TO RIOT AND A DELIBERATE PROVOCATION WHICH DOES NOT WARRANT FIRST AMENDMENT PROTECTION.

The opinion of the Circuit Court of Appeals cited *Brandenburg* v. *Ohio,* 395 U.S. 447 (1969) and *Feiner* v. *New York,* 340 U.S. 315 (1951) as authority that intentional incitement to riot may be prohibited. In *Brandenburg,* the Court said (at page 447) ". . . The constitutional guarantees of free speech and free press do not permit the state to forbid or proscribe advocacy of use of force or of law violation *except where such advocacy is directed to inciting or provoking imminent lawless action and is likely to incite or produce such action*" (emphasis added). In *Feiner,* the Court said, "No one would have the hardihood to suggest that the principle of freedom of speech sanctioned incitement to riot . . ." However, the opinion below precluded the consideration of these cases because of "concessions" made by the Village of Skokie.

Constitutional issues, particularly involving a municipality as a litigant, should be determined by the facts as established by the record and the law applicable to them and not by alleged "concessions" or failure to argue by or on behalf of the municipality. *Mitchell* v. *Archibald and Kendall, Inc.*, No. 77-2216, 7th Circuit Court of Appeals.

The Village of Skokie has a constitutional obligation to preserve order and to restrain violence in the event that the proposed demonstration is sanctioned by the Courts and takes place in the Village. It does not "fear" this eventuality because it is confident that its resources will be sufficient to control the situation. Statements to this effect made in argument should not be construed as concessions with respect to the legality of the proscribed conduct. The Court of Appeals likewise denied the applicability of the "fighting words" doctrine in *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1948) for the same reason. It seems absurd to hold that fighting words addressed to an individual can be proscribed (as in *Chaplinsky*) while fighting words addressed to an entire group under much more serious conditions cannot be.

The Village does not argue that *Terminiello* v. *Chicago*, 337 U.S. 1 (1949) which refers only to conduct which "stirs the public to anger, invites dispute, brings about unrest, or creates a disturbance" should be overruled. The conduct proscribed by the ordinance and the proposed demonstration would *also* constitute group defamation and inflicting emotional distress of the most serious kind, and deliberately and intentionally provoking and inciting to riot.

CONCLUSION

In a footnote to the opinion in *Beauharnais, supra,* Mr. Justice Frankfurter said (343 U.S. at page 263):

> "The rubric 'race, color, creed or religion' which describes the type of group libel which is punishable, has attained too fixed a meaning to permit political groups to be brought within it. If a statute sought to outlaw libels of political parties, quite different problems not now before us would be raised. For one thing, the whole doctrine of fair comment as indispensable to the democratic political process would come into play."

Mr. Justice Jackson, specially dissenting in *Kunz* v. *New York*, 340 U.S. 290, said at page 299:

> "Jews, many of whose families perished in extermination furnaces of Dachau and Auschwitz, are more than tolerant if they pass off lightly the suggestion that unbelievers in Christ should all have been burned."

In 340 U.S. at page 313, Mr. Justice Jackson said:

> "If any two subjects are intrinsically incendiary and divisive, they are race and religion. Racial fears and hatreds have been at the root of the most terrible riots that have disgraced American civilization. They are ugly possibilities that overhang every great American city. The 'consecrated hatreds of sect' account for more than a few of the world's bloody disorders. These are the explosives which the Court says Kunz may play with in the public streets, and the community must not only tolerate but aid him. I find no such doctrine in the Constitution."

The plaintiff Collin would play with the same explosives in the streets of Skokie, Illinois.

REQUEST FOR RELIEF

It is respectfully requested that this Court grant a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit and that upon such review this Court reverse that decision.

Respectfully submitted,

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77-1736

Supreme Court, U. S.
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No.

In the

Supreme Court of the United States

October Term, 1977

ALBERT SMITH, President of the Village of Skokie, Illinois; JOHN N. MATZER, JR., Village Manager of the Village of Skokie, Illinois; HARVEY SCHWARTZ, Corporation Counsel of the Village of Skokie, Illinois; and the VILLAGE OF SKOKIE, Illinois, a municipal corporation,

Petitioners.

vs.

FRANK COLLIN and the NATIONAL SOCIALIST PARTY OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX TO APPENDIX

PAGE

Appendix A:

Opinion of the United States District Court 1A

Appendix B:

Opinion of the United States Court of Appeals for the Seventh Circuit 48A

Appendix C:

Village Ordinance No. 77-5-N-994 entitled, "AN ORDINANCE RELATING TO PARADES AND PUBLIC ASSEMBLIES." 91A

Appendix D:

Village Ordinance No. 77-5-N-995 entitled, "AN ORDINANCE PROHIBITING THE DISSEMINATION OF MATERIALS WHICH PROMOTE AND INCITE GROUP HATRED." 98A

Appendix E:

Village Ordinance No. 77-5-N-996 entitled, "AN ORDINANCE PROHIBITING DEMONSTRATIONS BY MEMBERS OF POLITICAL PARTIES WEARING MILITARY-STYLE UNIFORMS." 100A

APPENDIX A

In The United States District Court
For the Northern District of Illinois
Eastern Division

Frank Collin, et al.,
Plaintiffs,
vs
Albert Smith, et al.,
Defendants.

No. 77 C 2982

MEMORANDUM OPINION AND ORDER

Plaintiffs, the National Socialist Party of America and its leader, Frank Collin, bring this action challenging three ordinances of the Village of Skokie, Illinois, on the grounds that the ordinances deprive them of the rights to freedom of speech and assembly in violation of the First and Fourteenth Amendments to the United States Constitution. Defendants are the Village itself and its President, Village Manager and Corporation Counsel. On October 21, 1977, the court denied plaintiffs' motion for a preliminary injunction but ordered the cause set for trial on an expedited schedule in view of the compelling national interest in prompt resolution of cases implicating First Amendment freedoms. The case was tried to the bench on December 2, 1977, and has now been submitted for judgment on the trial record and additional documentary evidence admitted by stipulation of the parties. This Memorandum Opinion constitutes the court's findings of fact and conclusions of law for purposes of F.R.Civ.P. 52(a).

I. *Factual Background*

Skokie is a municipal corporation north of Chicago, which is generally regarded in the Chicago area as a predominantly Jewish community. In fact, as of 1974, it had

40,500 Jewish residents out of a total population of approximately 70,000. Under the Illinois Constitution, Skokie is a home rule unit and as such has plenary legislative authority to enact ordinances for the protection of the public welfare within its borders. Ill. Const. Art. VII, §6(a).

Plaintiff Collin testified that the National Socialist Party is "a Nazi organization", and that in public appearances its members wear uniforms reminiscent of those worn by members of the German Nazi Party during the rule of the Third Reich. Specifically, plaintiffs employ the swastika as a party symbol. Among their more controversial political views, plaintiffs believe that black persons are "biologically inferior" to whites and should be "repatriated" to Africa, and that American Jews have excessive influence in government and close ties to international Communism. Collin stated that this Jewish influence should be "exposed and documented and presented to the American public", but denied that plaintiffs endorse the Third Reich's "final solution" to the problem of Jewish influence—genocide.

In late 1976, plaintiffs planned a series of demonstrations in Jewish communities, including Skokie. According to plaintiffs' publications, this campaign was based on the belief that Jews are responsible for busing and racial integration in the Chicago school system, which plaintiffs have been protesting in other parts of the Chicago area. Plaintiffs were denied permission to demonstrate in a Skokie park because of a Skokie Park District ordinance which required them to obtain $350,000 in liability and property damage insurance.

Plaintiffs then planned a demonstration in the Village to protest the Park District ordinance. The demonstration was set for May 1, 1977. On March 20, Collin notified Skokie Police Chief Kenneth Chamberlain of plaintiffs' plans and assured him that the demonstration would be brief, peaceful and orderly. News of the planned demonstration caused considerable consternation in Skokie. The situation was exacerbated by the appearance of some of plaintiffs' handbills within the Village and by a rash of offensive and threatening telephone calls to Skokie residents with Jewish surnames. Although there were no evidence that plaintiffs were responsible for these called,[1] they undoubtedly stirred public sentiment against the proposed demonstration. As a result of this sentiment, the Village decided to attempt to prevent the demonstration. It obtained a preliminary injunction against the demonstration in state court, which has since been vacated, and on May 2, 1977, enacted the three ordinances at issue in this action.

Ordinance #994 is a comprehensive permit system for all parades or public assemblies of more than 50 persons anywhere within Skokie. It requires all permit applicants to obtain $300,000 in liability insurance and $50,000 in property damage insurance. Ordinances #995 and #996 are both criminal measures: #995 prohibits the dissemination of material which incites racial or religious hatred, with intent to incite such hatred; #996 prohibits public demonstrations by members of political parties while wearing military-style uniforms. These ordinances are also enforced through the permit mechanism of #994. A specific provision of that ordinance, §27-56(c), requires that a permit be denied to public assemblies which will engage in the activity prohibited by #995[2] and a catch-all provision relating to assemblies organized for unlawful purposes, §27-56(j), serves the same function for #996.

On June 22, 1977, Collin applied for a permit under #994. The application recited that the proposed public assembly would take place on July 4, would consist of 30 to 50 people demonstrating in front of the Village Hall, would last about a half hour, and would not disrupt traffic. It stated further that the participants wear uniforms including swastikas and carry placards carrying statements such as "White Free Speech", "Free Speech for the White Man", and "Free Speech for White Americans", but would not distribute handbills or literature. The evidence shows that the location selected for the parade was in a commercial, rather than residential area of Skokie. Finally, the application stated that plaintiffs could not obtain the required insurance and requested that the Village either waive the requirement or assist plaintiffs in finding an insurer. The application was denied by defendant John Matzer, the Village Manager, on the grounds that plaintiffs planned to wear military-style uniforms in violation of #996. Plaintiffs responded by bringing this action.

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[1] Defendants did not suggest that plaintiffs were responsible for the calls, and the reporting officer on one of the police reports admitted into evidence expressed the opinion that it was doubtful that plaintiffs were responsible.

[2] This is an oversimplification of §27-56(c), which is discussed in detail in part IV(F) of this opinion.

II. *Preliminary Issues*

As in all actions to invalidate state laws on constitutional grounds, the court must begin by considering the various doctrines which limit the intrusion of the federal courts into the operation of state government. All three ordinances impose criminal penalties for their violation. *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), held that the federal district courts have jurisdiction over actions for declaratory and injunctive relief against state criminal statutes on the grounds that they violate the First Amendment through vagueness and overbreadth.[3] Although *Dombrowski* has been restricted as to injunctive relief by *Younger* v. *Harris,* 401 U.S. 37 (1971), *Steffel* v. *Thompson,* 415 U.S. 452 (1974), held that declaratory relief may still be granted when there is an imminent threat of prosecution if the plaintiffs exercise their First Amendment rights. Plaintiffs have requested both declaratory and injunctive relief. Accordingly, if plaintiffs have satisfied the other prerequisites for the exercise of federal jurisdiction, the prayer for declaratory relief provides a basis for this action under *Steffel.* The question of possible injunctive relief will be discussed later.

The first questions are whether plaintiffs have standing to challenge these ordinances, and, if so, whether their challenge is ripe for adjudication. Standing requires that the ordinances pose a direct, immediate threat to plaintiffs' rights. There can be no question of plaintiffs' standing to challenge #996: it is conceded that plaintiffs comprise a political party whose members customarily wear military-style uniforms, and if they carry out their planned demonstration in Skokie they will be in clear violation of the ordinance. As to #995, the question is slightly less clear since plaintiffs' application stated that they do not intend to distribute literature, hate-inciting or otherwise, in Skokie. However, as discussed below, the definition of "dissemination of materials" in #995 is quite broad, and specifically includes display of signs and wearing of clothing "of symbolic significance". Moreover, the court finds that ordinance #995 was specifically intended to apply to the display of Nazi regalia and propaganda.[4] The "clothing of symbolic significance" clause was clearly directed at plaintiffs' Third Reich style uniforms and swastikas, and much of defendants' evidence dealt with the significance of these symbols to Jewish survivors of World War II. Accordingly, there is a substantial probability that any demonstration by plaintiffs in Skokie would result in their arrest for violation of #995, and plaintiffs have standing to challenge the ordinance.

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[3] Jurisdiction is based on the Civil Rights Act, 42 U.S.C. §1983 and 28 U.S.C. §1343(3).

[4] The wording of the ordinances and the context in which they were enacted leave no doubt that they were intended to cover demonstrations by Nazi organizations. However, this finding is merely one of legislative intent to aid the court in interpreting the ordinances; plaintiffs have not sought to prove that the ordinances are so clearly directed against them alone as to constitute bills of attainder. A law of general applicability is not unconstitutional merely because its enactment was inspired by a specific example of the evil which it seeks to suppress.

The only standing question with regard to #994 is whether plaintiffs need a permit at all, since their proposed assembly would consist only of 30 to 50 persons. The ordinance actually requires a permit for any assembly in which the number of participants "may reasonably be assumed to exceed 50", §27-51. Thus, one who holds an assembly without a permit which more than 50 persons attend would violate the ordinance if it were found that he should have reasonably assumed more than 50 would attend. In light of the criminal penalties the ordinance imposes for lack of foresight, the court feels that plaintiffs are the best judge of their need for a permit and have standing to challenge #994.

The only thing currently keeping plaintiffs from demonstrating in Skokie and violating ordinances #995 and #996 is their inability to obtain a permit under #994; accordingly, if their challenge to #994 is ripe for adjudication, the challenges to #995 and #996 are also ripe. This leaves a ripeness problem only as to #994. Since defendant Matzer denied the permit application solely on the basis of #996, defendants have never officially considered whether the application satisfied the insurance requirement or the "no incitement of racial hatred" requirement. However, ripeness is a practical doctrine, which should not be employed to require the parties to satisfy empty formalities when the issues between them are clearly defined. As discussed below, plaintiffs have proved that they cannot obtain the required insurance, and it is virtually certain that defendants would refuse to waive the requirement in light of their implacable opposition to plaintiffs' presence in Skokie. Similarly, the court's finding that these ordinances were specifically intended to apply to plaintiffs makes it equally certain that plaintiffs' application would be denied under the incitement of hatred standard. Further, although plaintiffs could force a decision on the insurance issue by agreeing not to wear uniforms, there is no way they could avoid the insurance problem in order to force a decision on the racial hatred issue. Accordingly, the court finds that the issues between the parties are ripe for adjudication under each of the three ordinances.

Thus, the court has jurisdiction over this case. Whether it may properly exercise that jurisdiction depends on the doctrines of exhaustion of remedies and abstention. Plaintiffs could have appealed the denial of their permit application to the Village Board of Trustees, under §27-57, and then filed an action for judicial review in state court under the Illinois Administrative Review Act, Ill. Rev.Stat. ch. 110, §§264, *et seq.* A plaintiff is never required to exhaust administrative remedies when to do so would be obviously futile. *Porter County Chapter of the Izaak Walton League of America* v. *Costle,* Dkt. Nos. 76-2098 and 77-1262 (7th Cir. Jan. 30, 1978), Slip Op. at 6. This is especially true in civil rights cases, where the congressional policy of providing a federal forum for vindication of constitutional rights is particularly strong. *Monroe* v. *Pape,* 365 U.S. 167 (1961); *see Drexler* v. *Southwest Dubois School Corp.,* 504 F.2d 836, 838-39 (7th Cir. 1974). For the reasons discussed above, the court finds that an appeal to the Board of Trustees would be futile in this case. Moreover, there is no reason to require plaintiffs to proceed under the Administrative Review Act when their claims are based upon freedom of speech rather than administrative procedure. Exhaustion is not required.

Although abstention is generally not favored in civil rights cases, *Drexler, supra,* the question arises in this case due to the ongoing state court litigation between the parties, the subject of which to some degree overlaps this case. As noted above, defendants in this case obtained a preliminary injunction from the Circuit Court of Cook County, which prohibited plaintiffs from demonstrating at all in Skokie, from wearing their uniforms and swastikas there, and from distributing materials which incite racial hatred. The Illinois Appellate Court for the First District modified the injunction to prohibit only display of the swastikas, on the grounds that as to the other issues the Village had not met its extraordinary burden of showing an immediate harm which would justify preliminary injunctive relief in a case raising First Amendment issues. *Village of Skokie* v. *National Socialist Party of America,* 51 Ill.App.3d 279 (1st Dist. 1977). On appeal, the Illinois Supreme Court held that the preliminary injunction forbidding the display of the swastika was also improper in light of the presumptive unconstitutionality of any prior restraint on speech. Dkt. No. 49769, Jan. 27, 1978. The Village did not cross-appeal the Appellate Court's modification of the injunction, apparently because the subject matter of the part of the injunction vacated by the Appellate Court was by then covered by the ordinances involved in this suit.

The federal courts must abstain from deciding a constitutional question when there is an unresolved question of state law which could either moot the constitutional question or substantially alter it. *Railroad Commission of Texas* v. *Pullman Co.,* 312 U.S. 496 (1941). Abstention would be improper in a case merely because the same federal law questions presented are also being litigated in another case. *Colorado River Water Cons. Dist.* v. *United States,* 424 U.S. 800, 817-19 (1976). The court has examined the briefs and decisions in the state court litigation between the parties, and there appears to be no substantial unresolved issue of state law there involved which would affect this case. Moreover, in the present posture of the state case, the overlap in issues between the two actions is actually quite small. The only question actually decided by the Illinois Supreme Court, which the Village is now seeking to take to the United States Supreme Court, is whether the use of a specific symbol—the swastika—can be enjoined in a situation where it may be emotionally damaging to a specific group of persons,[5] whereas this case is concerned with the impact of a broad range of municipal ordinances on many kinds of speech and speech-related behavior. Accordingly, the court finds that it is not required to abstain from deciding this case.

This court's opinion will now deal with the federal question whether the three ordinances under review impermissibly limit and burden the exercise of free speech and assembly in Skokie.

III. The Insurance Ordinance

Section 27-54 of Ordinance #994 provides that:

> "No permit shall be issued to any applicant until such applicant procures Public Liability Insurance in an amount of not less than Three Hundred Thousand Dollars (300,000.00) and Property Damage Insurance of not less than Fifty Thousand Dollars ($50,000.00). Prior to the issuance of the permit, certificates of such insurance must be submitted to the Village Manager for verification that the company issuing such insurance is authorized to do business and write policies of insurance in the State of Illinois."

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[5] Immediately after vacating the Village's injunction, the Illinois Supreme Court granted interlocutory review in *Sol Goldstein* v. *Franklin Collin,* an action by a resident of Skokie seeking to enjoin the planned demonstration on the grounds that it would harm him as a survivor of the Nazi holocaust in World War II. The Court summarily ordered the action dismissed without briefing or argument. A petition for rehearing is pending. This case could potentially raise issues relevant to Part IV. D. of this opinion, but in view of the treatment the Court has given the case, it does not justify abstention. This court, of course, expresses no opinion as to the merits of plaintiff's position in that case.

In addition, §27-56(j) specifically requires the Village Manager to deny a permit to any person failing to comply with §27-54. The requirement may be waived by a unanimous vote of the President and Board of Trustees, §27-64. Staging a public assembly without a permit is punishable by a $500 fine, §27-65.

In *Collin* v. *O'Malley*, Dkt. No. 76 C 2024, in which the plaintiffs were the same as the plaintiffs here, Judge Leighton of this court held that a virtually identical ordinance of the Chicago Park District violated the First Amendment because its effect was to completely preclude organizations such as the National Socialist Party from staging public assemblies in the parks. The record in *O'Malley* has been admitted into evidence in this case by stipulation, but defendants do not stipulate to Judge Leighton's findings or conclusions and this court must make its own review of the record.

The court is in complete agreement with Judge Leighton's finding that insurance of the type required by the Skokie and Park District ordinances is beyond the reach of plaintiffs. Janet Jarosz, a licensed insurance broker, testified in *O'Malley* that she had made a continuing effort for four or five months to obtain such insurance for plaintiffs without success. She contacted 18 separate companies and brokerage firms without success, including several that specialize in unusual and hard to place lines of insurance. She gave as her professional opinion the conclusion that plaintiffs could not obtain the insurance, because insurance companies are simply not interested in writing the kind of policy required due to the unknown risks involved, and consequently will write the policies only as an accommodation to well-established and respectable organizations. In an affidavit executed for this action, Jarosz stated that she had made additional efforts to obtain the insurance for plaintiffs as recently as August, 1977, and she reaffirmed her original conclusions. Jarosz also testified that if the insurance were available to plaintiffs, the premium would be as much as $1,000 for each event. Neither the *O'Malley* defendants nor the defendants in this case presented any evidence to contradict Jarosz's testimony.

The law regarding use of public streets for demonstrations was set down in the plurality opinion of Mr. Justice Roebrts in *Hague* v. *C.I.O.*, 307 U.S. 496, 515-16 (1939):

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."

The ordinance under review in effect bans all public assemblies above a certain size within the Village unless the sponsoring organization either has the wherewithal to obtain a rare and expensive form of insurance policy or receives an exemption from the ordinance's coverage. The court concludes that this drastic restriction of the right of freedom of speech and assembly is an abridgement "in the guise of regulation." There are two bases for this conclusion.

First, the burdensome effect of the insurance requirement itself has not been shown to be necessary. The government may impose financial burdens on the exercise of First Amendment rights, such as permit fees, only when the amount involved is reasonable and directly related to the accomplishment of legitimate governmental purposes. *Cox* v. *New Hampshire,* 312 U.S. 569, 576-77 (1941); *United States Labor Party* v. *Codd,* 527 F.2d 118 (2d Cir. 1975); *see also Lubin* v. *Panish,* 415 U.S. 709 (1974); *Bullock* v. *Carter,* 405 U.S. 134 (1972). In this case, defendants have presented no evidence whatsoever of the Village's need for such a burdensome insurance requirement. Nothing in the record shows that Skokie or any comparable municipality has ever been threatened with damage by a public assembly which would have been prevented or alleviated by an insurance requirement of this type.

Second, the ordinance is objectionable because some organizations may be exempted from its requirements and there are no principled standards for determining which organizations are exempt. In addition to the specific waiver provision of §27-56, any activity sponsored by a governmental agency is exempt. The record shows that the device of "co-sponsorship" by the Village itself and related entities such as the Skokie Park District has enabled groups such as the Northeast Skokie Property Owners Association and the American Legion to escape the insurance requirement. This device permits organizations that have the approval of the Village government to avoid the restrictions imposed on all other groups, with no indication that such exemptions have been or will be granted on the basis of the threat of liability or property damage posed by their activities.[6] It is well established that permit systems which are so devoid of standards that they allow government officials to engage in covert censorship in their administration are particularly vulnerable to First Amendment challenge. *Hague, supra,* 307 U.S. at 516; *see also Shuttlesworth* v. *City of Birmingham,* 394 U.S. 147, 150-51 (1969); *Cox* v. *Louisiana,* 379 U.S. 536, 555-58 (1965).

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[6] Defendant Matzer conceded that there were no written standards governing waiver or co-sponsorship. In fact, the ordinance contains no explicit provision for co-sponsorship at all; the adoption of this device by the Village government is a further indication of the standardless manner in which the insurance requirement has been enforced.

In short, the court finds that §§27-54 and 27-56(j) of Ordinance #994 impose a virtually insuperable obstacle to the free exercise of First Amendment rights in the Village of Skokie, which obstacle has not been proven to be justified by the legitimate needs of the Village and which may be disposed of at the uncontrolled and standardless discretion of the Village government. These sections are, accordingly, unconstitutional on their face.[7]

IV. *The "Racial Slur" Ordinances*

A. *Introduction*

Ordinance #995 and §27-56(c) of #994 are both directed at a type of speech that the parties have characterized generally as "racial slurs". A more precise definition can be formulated only in the context of a discussion of the ordinances themselves. For the sake of convenience, the court will also use the same term. Section 28-43.1 of Ordinance #995 provides that:

> "The dissemination of any materials within the Village of Skokie which promotes and incites hatred against persons by reason of their race, national

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[7] Plaintiffs have also introduced some evidence indicating that the requirement that permits be filed 30 days before the scheduled activities, §27-52, has been waived by the Village Manager in an arbitrary manner. However, the evidence as a whole does not show a clearly discriminatory pattern of granting waivers of this requirement, and the requirement does not appear to be particularly burdensome. If plaintiffs were trying to prove that this requirement unduly restricts free speech, they have failed to do so.

> origin, or religion, and is intended to do so, is hereby prohibited."[8]

"Dissemination of materials" is defined by §28-43.2 to include:

> "publication or display or distribution of posters, signs, handbills, or writings and public display of markings and clothing of symbolic significance."

Violation of Ordinance #995 is a misdemeanor punishable by a fine of up to $500 and/or imprisonment for up to six months, §29-43.4. The Corporation Counsel is authorized to seek injunctive relief against prospective violations, §29-43.5.

Section 27-56(c) covers the same subject, but is worded somewhat differently. It requires the Village Manager to deny a permit for any assembly which will:

> "portray criminality, depravity or lack of virtue in, or incite violence, hatred, abuse or hostility toward a person or group of persons by reason of reference to religious, racial, ethnic, national or regional affiliation."

The different issues raised by this ordinance will be discussed after the analysis of Ordinance #995.

It is apparent that in enacting these ordinances, the Village government acted primarily to shield its citizens —and particularly its Jewish citizens—from the flaunting by plaintiffs of the symbols of a hated era and repugnant political philosophy. The ordinances adopted, however, do more than simply ban display of the swastika; they impose sweeping bans on the content of speech within

Skokie and include provisions for which there is almost no precedent in constitutional law. The importance and novelty of the issues involved requires a close re-examination of the basic principles of the First Amendment against which these ordinances must be measured.

B. *Fundamental Principles*

It must be made clear from the outset that defendants have no power to prevent plaintiffs from stating their political philosophy, including their opinions of black and Jewish people, however noxious and reprehensible that philosophy may be. The Supreme Court has held that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of the City of Chicago* v. *Mosley,* 408 U.S. 92, 95 (1972).

The principle derives from the theory of the "marketplace of ideas". As the Court has recently stated the theory: "there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 339-40 (1974). This theory has recently been the subject of considerable criticism, and the underlying basis of defendants' position, as well as much of the commentary on this case, seems to be that plaintiffs' philosophy is so thoroughly repugnant to any concept of civilized society that it is not entitled to entry into the "marketplace". As the late Prof. Alexander Bickel has argued, to permit an idea to be advocated is to concede its legitimacy and impliedly accept the possibility that it may be accepted and implemented as a social policy; and there are some policies whose implementation would be so completely unacceptable in a democratic society that their advocacy should not be permitted. A. Bickel, *The Morality of Consent,* 70-77 (1975).

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[8] The use of the verbs "promotes" and "incites" would seem to indicate that the dependent clause modifies the singular "dissemination" rather than the plural "materials", but it appears from the remainder of the ordinance and its use throughout the parties' briefs that the ordinance is understood to prohibit materials which promote and incite as opposed to dissemination which does so.

This interpretation of the marketplace of ideas principle gains support from Supreme Court statements such as that of the *Gertz* Court that "there is no such thing as a false idea", and from the opinions of Justice Oliver Wendell Holmes, the judge most responsible for incorporation of the marketplace concept into the First Amendment. *See Gitlow* v. *New York,* 268 U.S. 652, 673 (1925) (Holmes, J., dissenting). And it is undoubtedly true that if any philosophy should be regarded as completely unacceptable to civilized society, that of plaintiffs, who, disavowing on the witness stand any advocacy of genocide, have nevertheless deliberately identified themselves with a regime whose record of brutality and barbarism is unmatched in modern history, would be a good place to start.

This criticism of the marketplace of ideas theory is, however, based on an incorrect interpretation of the theory's premises. The early English libertarian philosophers who developed the concept did not believe that, in the *Gertz* Court's somewhat unfortunate phrase, "there is no such thing as a false idea." They believed that false ideas existed; and that the process of free debate could be relied upon to identify false ideas, but that the government could not. See J. Milton, *Areopagitica—A Speech for the Liberty of Unlicensed Printing* (1644); J. S. Mill, *On Liberty,* ch. II (1859). The words of Mr. Justice Brandeis remain the classic exposition of this principle in the context of American constitutional law:

> "Those who won our independence believed . . . that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form." *Whitney* v. *California,* 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) (footnote omitted).

The question, then, is not whether there are some ideas that are completely unacceptable in a civilized society. Rather the question is which danger is greater: the danger that allowing the government to punish "unacceptable" ideas will lead to suppression of ideas that are merely uncomfortable to those in power; or the danger that permitting free debate on such unacceptable ideas will encourage their acceptance rather than discouraging them by revealing their pernicious quality. This question is one of the fundamental dilemmas of free speech, and it is certainly open to public debate, but for the purposes of this case, the question has been definitively settled by the Supreme Court.

From the beginning the Court has held that speech may be punished only when it actually causes some social harm which the government can legitimately prevent. *See Schenck* v. *United States,* 249 U.S. 47 (1919). For many years, however, the Court held that certain doctrines, such as the violent overthrow of the government, were so inherently harmful to society that their mere advocacy in any form could be prohibited. *Abrams* v. *United States,* 250 U.S. 616 (1919); *Gitlow, supra; Whitney, supra.* Justices Holmes and Brandeis consistently dissented from these opinions on the grounds that allowing the prohibition of mere advocacy would inevitably lead to untrammeled censorship. They took the position that advocacy even of violence or lawlessness could be punished only when it occurred in a situation in which the advocacy posed a "clear and present danger" of actually inciting the lawless actions advocated.

The Holmes-Brandeis approach gained ascendancy through the 1940's and 1950's as the Court retreated from the position that all advocacy of Communism could be prohibited. *See Dennis* v. *United States,* 341 U.S. 494, 502-11 (1951), (plurality opinion). In *Yates* v. *United States,* 354 U.S. 298 (1957), the Court attempted to draw a distinction between "abstract" advocacy, which is protected by the First Amendment, and advocacy "directed to stirring people to action", *id.* at 326-27. This standard proved practically unworkable, and in *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969), the Court abandoned the attempt to define kinds of advocacy which are sufficiently dangerous in themselves to warrant suppression. It adopted the Bandeis position in *Whitney,* and held that advocacy of any idea can be prohibited only when it is both intended to and likely to incite "imminent lawless action".

Since the Court has thus squarely rejected the theory that some ideas are too dangerous to permit their advocacy, it follows that plaintiffs have the right to advocate their political views within Skokie. The question remains, whether Ordinance #995 unacceptably restricts their ability to do so.

C. *"Unprotected" Speech and Fighting Words*

As discussed above, the central issue in First Amendment cases is the constant tension between the policy of permitting unrestricted exchange and discussion of ideas and the government's legitimate interest in preventing the harms that may be caused by speech. When the

speech involved takes the form of the advocacy of ideas, *Brandenburg* establishes that only harm serious enough to justify its restriction is the imminent threat of lawless action. Defendants in this case have disclaimed any reliance on *Brandenburg,* stating: "The Village *does not* contend that the forbidden conduct [speech which intentionally incites racial hatred] will create a clear and present danger of violence, riot, breach of peace, or other disorders." Defendant's Brief in Response to Plaintiffs' Memorandum of Law, at 2 (emphasis in original).

Thus, the ordinances may not prohibit advocacy which falls short of incitement of imminent lawless action. However, it has long been established that certain kinds of language are of so little utility in the conveyance of ideas that they can be prohibited on the basis of harms less serious than the threat of imminent lawlessness. Such speech is generally referred to as "unprotected", and it includes "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or incite an immediate breach of the peace."*Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 572 (1942). Defendants' position is that language which intentionally incites racial hatred is unprotected speech.

Before examining the merits of this argument, the court notes that the term "unprotected speech" is something of a misnomer, for in reality all speech derives considerable protection from the First Amendment. The reason is that determination of whether speech is valueless and therefore unprotected inevitably involves to some extent an inquiry into its content, and thus raises the possibility that the speech will be suppressed in part because of the offensiveness of the idea it conveys. *See Young* v. *American Mini Theatres, Inc.,* 427 U.S. 50, 65-67 (1976) (plurality opinion). In order to counteract this tendency and insure the free flow of debate, the Court has developed the theory that First Amendment values require "breathing space". In other words, the government is not only prohibited from regulating protected speech directly, it is also prohibited from impinging too closely upon it and thereby dampening the vigor of debate. This principle requires all First Amendment cases to be considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). That such an approach will often protect speech which could be prohibited if laws could be drafted and enforced with perfect clarity and precision is regarded as the price which must be paid for the full preservation of First Amendment values.

Thus, there are actually two questions involved here: whether "racial slurs" are unprotected speech; and, if so, whether the definition of racial slurs employed by Ordinance #995 is sufficiently precise to reach only unprotected slurs and allow adequate breathing space for protected speech.

The doctrine of unprotected speech was first developed in cases involving abusive epithets and insults. In *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), and *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942), members of the Jehovah's Witnesses sect were convicted of inciting breaches of the peace on the basis of their use of language which the Court characterized as highly offensive. The *Cantwell* Court began with the premise that "[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution . . ." 310 U.S. at 309-10. The *Chaplinsky* Court added that while such speech might have a "slight social value as a step to truth", such a slight value is "clearly outweighed by the social interest in order and morality." 315 U.S. at 572.

This analysis would seem to suggest that the government may generally prohibit speech which is not a communication of ideas or opinion. The Court, however, avoided such a broad approach to the restriction of unprotected speech in favor of an inquiry into the conduct of the speaker, the circumstances in which the speech was employed, and the actual likelihood that it would provoke a breach of the peace. Cantwell's speech had consisted of a phonograph record which he played on a public street. He had asked permission to play the record, had stopped when asked to do so, and had at no time been belligerent, offensive or truculent. His conviction was reversed. Chaplinsky, on the other hand, had called another a "damned racketeer" and "damned Fascist" to his face in a belligerent manner; his conviction was affirmed.

This narrow approach to unprotected speech was emphasized by *Terminiello* v. *City of Chicago*, 337 U.S. 1 (1949). Terminiello was convicted for disorderly conduct on the basis of an inflammatory speech filled with offensive epithets. The trial court charged the jury that the offense included conduct which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." The Illinois Supreme Court affirmed, finding no constitutional problem since Terminiello's speech had been so offensive and insulting that it was unprotected under *Cantwell* and *Chaplinsky*. *See* 400 Ill. 23, 34-35 (1948). The Supreme Court reversed without even considering whether the speech was unprotected. Inviting dispute, creating unrest and stirring anger are among the "high purposes" of free debate, the Court said, and therefore no speech could be punished merely because it accomplished those purposes.

Thus, *Cantwell, Chaplinsky* and *Terminiello* established a two-part test for the restriction of the "fighting words" class of unprotected speech. The speech must, considered objectively, be abusive and insulting rather than a communication of ideas, and it must actually be used in an abusive manner in a situation which presents an actual danger that it will cause a breach of the peace. The fighting words concept has continued to dominate later unprotected speech cases, which have built upon these basic principles.

First, the Court has several times emphasized that care must be taken to insure that what is restricted is insulting and offensive *language,* not the communication of offensive *ideas.* "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas themselves are offensive to some of their hearers." *Street* v. *New York,* 394 U.S. 576, 592 (1969); *see Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, 419 (1971); *Bachellar* v. *Maryland,* 397 U.S. 564 (1970). Even where the evidence is so offended by the ideas being expressed that it becomes disorderly and attempts to silence the speaker, it is the duty of the police to attempt to protect the speaker, not to silence his speech if it does not consist of unprotected epithets. *Gooding* v. *Wilson,* 405 U.S. 518, 527 (1972); *Gregory* v. *City of Chicago,* 394 U.S. 111 (1969); *Cox* v. *Louisiana,* 379 U.S. 536, 546-48 (1965).

In *Cohen* v. *California,* 403 U.S. 15 (1971), the Court discussed in detail the rule that even unprotected speech may only be suppressed when it threatens a harm. Cohen had worn a jacket inscribed with the phrase "Fuck the Draft", and was convicted of "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct." The Court began by restating the objective element of the test: fighting words, it said, are "those personally abusive epithets, which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." Cohen's choice of language, it said, would satisfy this test. 403 U.S. at 20.

Nevertheless, the Court reversed Cohen's conviction on the ground that in Cohen's case there was no showing that the speech had been used in a context which even made the occurrence of breach of the peace a possibility: "No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult . . . There is . . . no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result." *Id.*

Although the government need not prove an actual threat of an imminent breach of the peace in order to restrict unprotected speech, the Court said in *Cohen* the state's position amounted to an assertion that it could ban certain offensive epithets even without showing a possible breach, either because such epithets are inherently likely to cause violent reactions or in order to maintain a "suitable level of discourse within the body politic." Neither rationale, the Court said, was strong enough to justify establishing the "inherently boundless" precedent that the government could ban certain forms of language solely because of their offensiveness. To permit such bans would place unacceptable restrictions on free and uninhibited debate: The Court concluded:

> "To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength." 403 U.S. at 24-25.

In light of these principles, it is apparent that the line between protected and unprotected speech in matters relating to race and religion is an extraordinarily difficult one to draw. On the one hand, slurs and insults which rely upon the victim's racial and religious heritage are among the most vicious and abusive epithets known. As Mr. Justice Jackson has written:

> "These terse epithets come down to our generation weighted with hatreds accumulated through centuries of bloodshed. . . They are not in that class of epithets whose literal sting will be drawn if the speaker smiles

> when he uses them. They are always, and in every context, insults which do not spring from reason and can be answered by none. Their historical associations with violence are well understood, both by those who hurl and those who are struck by these missiles. . ." *Kunz* v. *New York,* 340 U.S. 290, 299 (1951) (Jackson, J., dissenting).[9]

On the other hand, it is equally clear that discussion of race and religion will often involve the exposition of ideas and positions that are inherently offensive to many, but which are nevertheless protected by the First Amendment. We live in a society that is very conscious of racial and religious differences, in which open discussion of important public issues will often require reference to racial and religious groups, often in terms which members of those groups, and others, would consider insulting and degrading. To choose an obvious example, discussion of the use of mandatory quotas in affirmative action programs cannot help but touch upon characteristics perceived to be shared by members of particular racial groups. The First Amendment does not permit the government to restrict discussion of such sensitive and emotion charged public issues to the sanitary prose of legal and social sciences technical jargon. *Cf. Bond* v. *Floyd,* 385 U.S. 116, 127, 134-45 (1966).

The question remains whether the language of Ordinance #995 is sufficiently precise to focus exclusively on the personally abusive use of epithets in situations where the possibility of breaches of the peace justifies the epithets' suppression and still permit the intemperate and emotional debate which may accompany any discussion of race and religion. Our courts have employed the doctrines of vagueness and of overbreadth to make this determination.

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[9] Although Justice Jackson's opinion was written in dissent, the passage cited dealt with a question not reached by the Court.

A law is unconstitutionally vague when it fails to give reasonable notice of the conduct which is prohibited and gives law enforcement personnel the opportunity to enforce it according to their personal prejudices. *Smith* v. *Goguen,* 415 U.S. 566 (1974). In First Amendment cases the doctrine has an added dimension, since a vague statute which covers speech-related activities may be enforced only against those who express unpopular opinions and thus be used as a device for censorship. *Grayned* v. *City of Rockford,* 408 U.S. 104, 108-114 (1972).

Statutes which punish speech solely on the basis of the emotion it arouses in other persons are vulnerable to findings of vagueness, *see, e.g., Ashton* v. *Kentucky,* 384 U.S. 195, 199-201 (1966), particularly where the emotion involved is subjective and difficult to define with precision. *Smith* v. *Goguen, supra,* invalidated a law punishing "contemptuous" treatment or display of the American flag, on the grounds that in an era in which the flag is often treated casually, the precise conduct which could be considered "contemptuous" and result in criminal sanctions was impossible to define. Similarly, *Coates* v. *City of Cincinnati,* 402 U.S. 611 (1971), struck down an ordinance which prohibited groups of people from conducting themselves in an "annoying" manner on a public street. The Court held that the First Amendment right of free assembly could not be conditioned upon compliance with a purely subjective standard such as "annoyance".

The Skokie ordinance punishes language which intentionally incites hatred. This standard is as subjective and impossible to clearly define as the standards found impermissible in *Smith* and *Coates. Terminiello* and its progeny establish that there is a constitutional right to incite unrest, dissatisfaction, and even anger with social conditions. The distinction between inciting anger with a social condition and hatred of the person or group perceived to be responsible for that condition is impossible to draw with the requisite clarity, and depends to a great extent upon the frame of mind of the listener. For example, plaintiffs believe that busing school children in order to accomplish integration is a threat to the integrity and quality of the public school system, and they also believe that blacks and Jews are the instigators of busing. They clearly have a constitutional right to say so, and to say so vehemently and forcefully. But at what point does a vehement attempt to arouse public anger at busing become an attempt to incite hatred of blacks and Jews? A society which values "uninhibited, robust and wide-open" debate cannot permit criminal sanctions to turn upon so fine a distinction. Ordinance #995 is unconstitutionally vague.

Even assuming that the distinction can be defined with sufficient clarity, however, the court also finds that the Ordinance is overbroad. A law is overbroad for First Amendment purposes when, even though it is directed at unprotected speech, it can also be applied to protected speech. Such a law is considered completely unconstitutional on its face even though it is capable of application in a constitutional manner, on the theory that the very existence of laws which can be applied to protected speech exercises an unacceptable inhibiting effect on free debate. In *Gooding* v. *Wilson,* 405 U.S. 518 (1972), the Court struck down a Georgia statute punishing the use of "opprobrious words or abusive language, tending to cause a breach of the peace", language which would seem to conform with the definition of fighting words. The Court found, however, that as construed by the Georgia courts, the phrase "tending to cause a breach of the peace" referred to the inherent character of the language rather than the circumstances in which it was used. As discussed above, the punishment of even abusive language inherently likely to cause breaches of the peace was found unacceptable in *Cohen.* Therefore, the statute was "susceptible of application to speech, although vulgar or offensive, that is protected by the First . . . Amendment", and was unconstitutional on its face. For examples of the stringency with which this test is applied, *see* ***Rosenfeld*** v. ***New Jersey,*** 408 U.S. 901 (1972); *Lewis* v. ***City of New Orleans,*** 408 U.S. 913 (1972).[10]

The Skokie ordinance punishes the mere "dissemination" of material which incites hatred, with dissemination broadly defined to include such relatively passive activities as distributing leaflets and wearing "symbolic" clothing. It is clearly not aimed solely at personally abusive, insulting behavior, as was required by *Cohen* and *Gooding.* The court cannot agree that the requirement that the language intentionally incite hatred is an adequate substitute for this limitation.

It may very well be true that hatred tends to spawn violence and that, unlike the unrest and dissatisfaction referred to in *Terminiello,* hatred serves no useful social function in itself. Nevertheless, the incitement of hatred is often a byproduct of vigorous debate on highly emotional subjects, and the basic message of *Cohen* is that a great deal of useless, offensive and even potentionally harmful language must be tolerated as part of the "verbal cacophony" that accompanies uninhibited debate, not for its own sake, but because any attempt to excise it from the public discourse with the blunt instrument of criminal sanctions must inevitably have a dampening effect on the vigor of that discourse. The Court has repeatedly rejected attempts to ban certain kinds of language on the basis of an "undifferentiated fear or apprehension of disturbance . . ." *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503, 508 (1969).

The requirement that speech pose an imminent danger of violence before it may be suppressed is relaxed to a great extent when the speech serves no useful social purpose, but Ordinance #995 seeks to dispense with the requirement entirely, and this it may not do. The ordinance is unconstitutionally overbroad.

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[10] Although the Court merely vacated *Rosenfeld* and *Lewis* for reconsideration in light of *Gooding* and *Cohen,* the statutes involved were quite narrowly phrased and construed by the state courts, and the fact that the Court even felt it necessary to vacate for reconsideration is an indication of the stringency of the overbreadth doctrine.

D. *Beauharnais* v. *Illinois*

The foregoing discussion has assumed that the only danger posed by racial slurs is that of imminent breach of the peace. This is the ordinary fighting words rationale for the suppression of offensive epithets, which under *Chaplinsky* include those which either incite breaches of the peace or "by their very utterance inflict injury." Defendants argue that racial slurs fall into this second category of speech-inflicted harms, and have presented psychiatric evidence showing the mental and emotional trauma that can be caused by such slurs.[11] Unlike epithets which cause breaches of the peace, those which inflict emotional trauma have attracted comparatively little judicial attention.

The keystone of defendants' argument in this uncharted field is *Beauharnais* v. *Illinois,* 343 U.S. 250 (1952), in which the Court upheld an Illinois criminal libel statute which made it unlawful:

> "for any person . . . to manufacture, sell, or offer for sale, advertise, or publish, present or exhibit in any public place in this state any lithograph,

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[11] Prof. David Gutman, Chief of the Psychology Division at Northwestern University, testified in detail on the psychological effect of racial slurs on members of groups, such as blacks and Jews, that have been the victims of prejudice and oppression. Defendants also presented the opinion testimony of leaders of several ethnic groups. Prof. Gutman was also of the opinion that the mere presence of plaintiffs in Skokie would have a severe harmful effect on Jewish survivors of World War II, but it is apparent that his views on this point are colored by his own interpretation of free speech and by his strong opposition to plaintiffs' political views.

> moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots. . ."

Beauharnais was convicted of violating this statute on the basis of leaflets printed and distributed by the White Circle League of America, of which he was president. The leaflets called on the Chicago government to "halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro." It added that, "If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will."

Mr. Justice Frankfurter, writing for the Court, relied on two distinct grounds to uphold the statute and did not make clear the relationship between them. First, he noted that one traditional basis of criminal libel law was the punishment of words likely to cause breaches of the peace, and that the Illinois Supreme Court had characterized Beauharnais' words as "liable to cause violence and disorder". It then detailed Illinois' long history of racial strife and concluded that there was a rational basis for the state's attempt to suppress language likely to further exacerbate racial tensions. This analysis followed the fighting words rationale of *Chaplinsky* and *Cantwell.*

However, the case cannot be viewed simply as an application of the fighting words rule. There was no showing that the peaceful distribution of the leaflets had immediately threatened a breach of the peace or that those who distributed them had been belligerent or truculent. In fact, the indictment had charged simply that the publication exposed black Illinoisians to "contempt, derision, or obloquy"; there was no reference to the part of the statute which prohibited words "productive of breach of the peace or riots." Thus, considered as a fighting words case, *Beauharnais* would seem indistinguishable from *Cantwell,* in which a conviction based on the peaceful playing of a highly offensive phonograph record was reversed.

The Court then turned to a second ground for upholding the statute, which had not been relied upon by the Illinois Supreme Court. *See* 408 Ill. 512, 517-18 (1951). The Court noted that a second traditional purpose of criminal libel law was to protect the reputation of persons who were defamed by the libel. There was no question, the Court said, that it would be defamatory to call an individual a thief, rapist and drug user, and that such libel would be unprotected speech. It saw no reason to apply a different rule when the defamation was directed to an entire race, since "a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he will-nilly belongs, as on his own merits." 343 U.S. at 257-58, 263. Therefore, the Court concluded, libel of racial and religious groups constituted a distinctive category of unprotected speech, and a showing of a danger of violence resulting from it was unnecessary. *Id.* at 266.

Beauharnais requires particularly close scrutiny for two reasons: first, because it is the sole Supreme Court case relied upon by defendants; and, second, because it is widely believed by First Amendment scholars that the case is no longer good law. The decision was originally accompanied by four powerful dissents. The dissenters ranged from Mr. Justice Black, who considered the statute unconstitutional on its face, to Mr. Justice Jackson, who objected only to the conduct of the trial; but all agreed on two points: that the government can constitutionally punish those who defame individual reputations or who incite breaches of the peace, and that Beauharnais had been punished for doing neither, but only for expressing his opinion. The case has since proven remarkably sterile as a source of constitutional law. So far as this court's researches have revealed it has never been relied on as controlling precedent in any Supreme Court case, and at least two circuit courts have stated in dicta that it is doubtful that the case is still good law. *Tollett* v. *United States,* 485 F.2d 1087, 1094 n. 14 (8th Cir. 1973); *Anti-Defamation League of B'nai B'rith* v. *FCC,* 403 F.2d 169, 174 n. 5 (D.C.Cir. 1968), *cert. denied,* 394 U.S. 930 (1969), (Wright, J., concurring); *see also* T. Emerson, *The System of Freedom of Expression* at 396 (1970).

Nevertheless, the case has never been expressly overruled, and this court must make its own determination as to its continued validity. At the outset, there is no doubt that the case's basic premises are still sound: the government may punish speech which defames individual reputation, or which incites a breach of the peace. However, as has been seen, a statute directed at unprotected speech may still fall afoul of the First Amendment if it is so broad or vague that it unacceptably inhibits free debate. The standards which the courts apply in determining whether a particular statute has this inhibiting effect have undergone considerable evolution since *Beauharnais,* and much of the analysis the Court employed in that case is obsolete by modern standards. Thus, before it can be found that *Beauharnais* establishes the constitutionality of a law which, like the Skokie ordinances, employs similar language, it must be determined whether the *Beauharnais* statute itself would pass muster if it were brought before the Supreme Court today.

Beauharnais held that speech which defames racial groups may be criminally punished even when it is not directed at any specific member of the defamed group. There are two possible rationales for this holding. First it may be presumed that defamation directed at a group damages the reputation of individual members of the group. Second, speech which defames a race or religion may be considered so inherently productive of violence that it is unnecessary to show that it is used in a personally provocative manner.

The first rationale supports defendants' argument that the Skokie ordinance should be upheld because speech which incites racial hatred inflicts psychological trauma on individual members of the victim race. The court will assume for the sake of this discussion that this psychological trauma is a harm sufficiently serious to consider the speech which inflicts it to be unprotected.[12] Nevertheless, the court finds that this interpretation of *Beauharnais* is no longer tenable.

Beginning with *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), the Court has systematically restricted the power of the states to protect individual reputations through libel laws. In doing so, the Court has abolished several of the old common law rules of libel law on the grounds that the danger posed to free speech outweighs the states' need for such rules in order to protect the reputation of their citizens. *See Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 348-50 (1974). The Court has abolished the rule that truth is a defense only when published with good motives and to a justifiable end. Truth is now an absolute defense to a libel suit, even when published

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[12] As defendants have pointed out, the development of actions for "mental outrage" and "intentional infliction of emotional distress" reflect a growing concern in state tort law for the serious character of purely mental and emotional injuries and the right of the victims of such injuries to compensation. *See Contrearas* v. *Crown Zellerbach Corp.,* 88 Wash.2d 735, 565 P.2d 1173 (1977); *cf. Knierim* v. *Izzo,* 22 Ill.2d 73 (1961). The federal courts should be hesitant to sweepingly invalidate state laws where narrower rulings will adequately protect constitutional rights. *See Cox Broadcasting Co.* v. *Cohn,* 420 U.S. 469, 487-89 (1975).

for malicious purposes.[13] The rule that a publisher is absolutely liable for the defamatory content of the matter published has also been abolished; a defamation plaintiff must now show that the publisher was at least negligent in failing to discover that the publication was false.[14] And finally, the Court has abolished the common law rule that if a publication is found by the court to be defamatory per se, the plaintiff need not prove that he had been damaged. The Court has held that damages must always be proven, and further has banned the award of punitive damages in civil actions.[15]

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[13] *Garrison* v. *Louisiana,* 379 U.S. 64 (1964), required the defense of truth in libel suits concerning public officials, and *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967), extended the rule to a private plaintiff suing for a publication that cast him in a "false light" but did not defame him, when the subject matter of the publication was a matter of public interest. In abandoning the public subject-private subject distinction in libel actions, see note 14 *infra, Gertz* seemed to assume that truth was always a complete defense to a libel action. In *Cox Broadcasting Co.* v. *Cohn,* 420 U.S. 469 (1975), the Court left open the possibility that damages could be recovered for a truthful publication concerning a matter of no public interest on an invasion of privacy, rather than libel, theory. It would appear, however, that the exception left open by *Cox Broadcasting* is a narrow one.

[14] The abolition of strict liability was a prophylatic measure designed to prevent publishers from censoring themselves through fear of large damage awards. In *New York Times,* the Court required public official to show "actual malice", specially defined as knowledge of falsity or reckless disregard for truth, before they could require damages for libel. In the ensuing decade, the Court wrestled repeatedly with the problem of publications which concern subjects of public interest but defame private individuals. *See Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29 (1971). Finally, in *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974), the Court compromised by returning to the *New York Times* rule for public officials and requiring at least negligence in all other actions.

Of course, *Gertz* dealt only with civil libel, and the Court has never specifically held that actual damage must be proven in criminal libel cases. However, the dominating theme of these cases has been the Court's concern for limiting libel laws to cases in which they are actually necessary for the protection of reputation, and it has consistently taken a pragmatic approach to determining whether a particular type of law is actually necessary. *See Garrison* v. *Louisiana,* 379 U.S. 64 (1964), discussed in text *infra.* In fact, an argument could be made based on *Gertz* and *Garrison* that all criminal libel laws designed only to protect reputation are unnecessary and excessively restrictive of speech, and should be considered unconstitutional. Such a position would strongly imply that any criminal law designed to punish the infliction of psychological trauma through speech such as racial slurs is unconstitutional, and that the victim should be limited to his tort law remedy. Resolution of this question is not necessary in this case, and the court expresses no opinion on it.

In the opinion of this court, the *Beauharnais* statute would now be considered unacceptable as a means of protecting reputations. The statute incorporated in some form all of these now-abolished common law libel principles. The trial court rejected a defense of truth, found that the pamphlets distributed constituted libel per se, and thus instructed the jury that the only question for them to resolve was whether Beauharnais had published the pamphlets. There was, of course, no finding of damage to any individual reputation. Moreover, the central theme of all the Court's libel cases has been that the states may protect reputations only with laws that are actually necessary to accomplish that purpose without imposing too great a threat to the uninhibited flow of public debate. Criminal libel laws, and particularly group criminal libel laws, are virtually unknown in modern criminal codes, and can hardly be said to be essential to the protection of reputations. See 53 C.J.S., Libel and Slander, §§11(c), 290; *Garrison* v. *Louisiana,* 379 U.S. 64 (1964).

This conclusion is strengthened by the treatment *Beauharnais* has received in subsequent Supreme Court cases dealing with defamation.

In *New York Times,* the Court referred briefly to the *Beauharnais* statute as one which punished speech both defamatory *and* likely to cause violence. 376 U.S. at 268. Later in its opinion, the Court considered the problem of seditious libel, a common subject of early criminal libel prosecutions which consisted of speech inspiring disrespect for and hatred towards the government and public officials in the conduct of their duties. The Court concluded that seditious libel prosecutions are per se unconstitutional, and further that the government may not presume that criticism of official government policies will automatically reflect on the personal reputations of the responsible public officials. *Id.* at 273-77, 290-92. There can be no question that races and religions have been and are the subject of legitimate debate, and the Court's reasoning casts considerable doubt on the propriety of presuming damage to individual members of a group from criticism of the group. All the *Beauharnais* dissenters noted the parallels between that case and seditious libel prosecutions. *See also Anti-Defamation League* v. *FCC, supra,* 403 F.2d at 173-74 (Wright, J., concurring).

The following term, the Court extended *New York Times* to criminal laws punishing libel of individuals in *Garrison* v. *Louisiana,* 379 U.S. 64 (1964). It began by noting that the original functions of criminal libel law—preventing breaches of the peace and protecting reputations—had been supplanted by the victim's tort law remedy early in our legal history, leaving the criminal law primarily as a weapon against seditious libel. The Court went on to say that libel laws are almost unknown in modern criminal codes, and their usefulness is highly questionable, except in controlling speech which threatens to disturb peace and order. The Court gave the *Beauharnais* statute as an example, describing it as "narrowly drawn" and "designed to reach speech, such as group vilification, 'especially likely to lead to public disorders.'" Thus, it appears that after *New York Times* and *Garrison*, the Court views speech which defames racial and religious groups merely as a special category of language likely to cause breaches of the peace.

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[15] *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 349 (1974). *Gertz* left open the possibility that presumed and punitive damages could be awarded on a showing of "*New York Times*" malice, see note 14 *supra,* but this form of "malice" consists only of the intentional or highly reckless use of a false and defamatory material. Malice in the sense of a deliberate intent to injure is not an acceptable basis for the punishment of libel. *Garrison* v. *Louisiana,* 379 U.S. 64 (1964).

Punishment for racial slurs directed at large groups poses even greater threats to free speech than punishment for group libel. Libel is a well understood legal concept, with a carefully defined and limited meaning. It consists of false speech which damages a person's reputation. Racial slurs are not so well defined, at least at this stage of development of the law, and the psychological trauma which they may cause is much more difficult to identify and prove than damage to reputation. It is particularly difficult to distinguish a person who suffers actually psychological trauma from one who is only highly offended, and the Court has made it clear that speech may not be punished merely because it offends.

In summary, the court concludes that insofar as *Beauharnais* held that speech which defames racial and religious groups may be restricted in order to protect the reputation of individual members of such groups, it has been overruled, or at the very least has been so severely undermined that it should not be extended to new kinds of speech-inflicted damage to individuals, where such an extension would pose a substantial danger of inhibiting free speech and debate. Thus, the first interpretation of *Beauharnais* cannot save Ordinance #995.

The question remains whether the ordinance can be supported by the second possible interpretation of *Beauharnais*: that fighting words need not be used in a personally abusive manner when they consist of language which defames a race or religion. The fact that *New York Times* and *Garrison* restated *Beauharnais* along these lines instead of completely overruling it gives support to this interpretation. However, neither of those cases squarely faced the question of whether *Beauharnais* could still be supported on this ground, and, as discussed above, all the modern authority rejects the theory that even unprotected speech may be prohibited solely on the basis of its inherent tendency to cause violence. *Cohen, supra*; *Gooding, supra*; *Tinker, supra*. If *Beauharnais* is still good law, racial and religious defamation is the only exception to this rule. It seems doubtful that such language is so extremely likely to cause violence as to justify this exception, and it is noteworthy that the Court has many times considered cases involving language which defamed races or religions without giving any indication that such an exception exists. *See, e.g., Brandenburg* v. *Ohio, supra; Carroll* v. *President and Commissioners of Princess Anne,* 393 U.S. 175 (1968).

The actual holding of *Beauharnais* was that the prohibition of language which defames races or religions bore a rational relation to the state's goal of preventing violence and disorder. However, the Court has since abandoned the rational relation to purpose approach to First Amendment cases, and now requires that laws which restrict free speech and assembly be necessary to achieve compelling state purposes.[16] *See, e.g., NAACP* v. *Button,*

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[16] The analysis in *Beauharnais* is also obsolete in that the Court seemed to assume that its only options were to permit the state to ban racial defamation completely or to require a showing of clear and present danger of violence in every case. At the time of *Beauharnais* the concept of clear and present danger was still developing, and it was unclear whether it applied at all in unpro-

371 U.S. 415, 438-44 (1963). Accordingly, the court concludes that if the Supreme Court were faced today with the question of whether a statute like that in *Beauharnais* is an acceptable means of preventing breaches of the peace, it would apply ordinary fighting words analysis. *See Ashton* v. *Kentucky,* 384 U.S. 195 (1966). The court has already concluded that Ordinance #995 cannot survive such analysis. Alternatively, if the court is wrong in concluding that *Beauharnais* has been overruled, at the very least it has been undermined so severely that it should be restricted to its facts. The statute in that case had been authoritatively construed to require findings that the speech involved fall within the technical definition of libel and that it be of a character likely to inspire a breach of the peace. The Skokie ordinance is not so limited.[17]

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[16] (Continued)

tected speech cases. See the discussion in Justice Jackson's *Beauharnais* dissent, 343 U.S. at 302-04. *Brandenburg* and *Cohen* have since made clear the distinction between speech that causes a danger of imminent violence and that which is used in a personally abusive manner.

[17] Defendants have also argued that the ordinance may be supported because advocacy of racial hatred within Skokie would disrupt the Village's efforts to achieve racial integration, and in particular would disrupt its public housing program. They rely on *Chicago Real Estate Board* v. *City of Chicago,* 36 Ill.2d 530, 552-53 (1967), in which the Illinois Supreme Court upheld Chicago's ban on "panic peddling" and "block busting" real estate buying practices against a First Amendment challenge. The court found that real estate dealers' practice of inducing property owners to sell their homes through fear of reductions in property value caused by racial minorities moving into a neighborhood was an integral part of discriminatory and illegal conduct, and thus was not "pure speech". The court's ruling was based on the principle, first established in labor picketing cases, that speech which is inextricably combined with some form of action, such as economic coercion, may be re-

E. *The Possibility of a Narrowing Construction*

Finally, the defendants argue that even if the ordinance is vague and overbroad, it is susceptible to a narrowing construction readily available in the state court, *Young* v. *American Mini Theatres, Inc.,* 427 U.S. 50, 60-61 ~~(1976),~~ and thus should not be declared unconstitutional on its face.

Whether a statute is susceptible to a narrowing construction is primarily a question of state law and legislative intent, rather than constitutional law. A federal court should not find a statute to be susceptible to a narrowing constructin merely because it believes that the state courts would also consider the statute unconstitutionally broad as drafted. Where it appears that a statute was actually intended to be as broad as it appears, and where it is defended on such broad grounds, it should not be considered subject to a narrowing construction just because the court can think of an interpretation which would save it. *See Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 215-16 (1975).

Defendants have not suggested any specific narrow interpretation which would rescue this ordinance. The gist of the court's analysis is that the ordinance is defective in that it is not limited to uses of racial slurs in a personally abusive or inciting manner, in situations where they either threaten to cause a breach of the peace or to inflict psychological harm on an identifiable victim.

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[17] (Continued)

stricted in the course of regulating the conduct. Unlike the real estate brokers involved in Chicago Real Estate Board, plaintiffs are engaged in no conduct which could affect Skokie's housing program other than their speech. The mere fact that plaintiffs' speech may delay the implementation of one of Skokie's policies does not justify restricting it. Opposition to government policy is a primary purpose of free speech, and public housing programs, however beneficial they may be, have no talismanic immunity from public criticism and debate.

The extreme breadth of the definition of dissemination of materials in the ordinance convinces the court that it was not intended to be restricted to such situations, and defendants have not suggested that there is any state law which would require it to be so restricted.[18] The court concludes that Ordinance #995 is not readily susceptible to a narrowing construction, and is, for the reasons discussed above, unconstitutional on its face.

F. *Ordinance #994*

Insofar as §27-56(c) of Ordinance #994 would deny a permit to a public assembly merely because the participants will use speech likely to incite hatred or hostility toward a race or religion, the ordinance's unconstitutionality follows from the discussion of #995 above. However, the language of §27-56(c) is not as clearly vague and overbroad as the comparable language of #995. It refers specifically to words which "portray criminality, depravity or lack of virtue", and also to the incitement of violence. Despite this narrower definition of the prohibited speech, §27-56(c) is also unconstitutional. Unlike Ordinance #995, §27-56(c) does not merely punish speech after it is spoken, but requires a person to obtain permission before he may speak at all. It is, in other words, a prior restraint on the content of speech.

Any content-based prior restraint bears a heavy presumption of unconstitutionality. *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, 419-20 (1971); *New York Times Co.* v. *United States,* 403 U.S. 713 (1971). The distinction between prior restraints and criminal sanctions is based on:

> "a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546, 569 (1975) (emphasis in original).

This particular prior restraint fails to overcome the presumption of unconstitutionality for three reasons. First, the "risks of freewheeling censorship" are particularly high. As discussed above, the distinction between protected and unprotected speech in this area is very hard to draw, and the evidence in this case shows clearly that plaintiffs' opinions are so unpopular in Skokie that it is highly doubtful that Village officials would issue a permit under any circumstances. Second, defendants' admission that there is no clear and present danger that the kind of speech prohibited by this ordinance would cause violence and disorders in the Village severely undercuts the Village's need for a prior restraint.

And finally, the permit system lacks adequate procedural safeguards. The Supreme Court has many times emphasized the necessity of providing a fair hearing and prompt judicial review in any procedure which imposes a prior restraint on speech. *See Carroll* v. *President and Commissioners of Princess Anne,* 393 U.S. 175 (1968); *cf. Freedman* v. *Maryland,* 380 U.S. 51 (1965). Ordinance #994 includes no guaranteed hearing, and there is no assurance that an applicant will be given an adequate opportunity to present his case. If a permit is denied, the only way for the applicant to obtain judicial review is to bear the expense and risk of filing suit to compel issuance of the permit. Accordingly, the court finds that, in addition to being vague and overbroad, §27-56(c) is unconstitutional as a prior restraint which unnecessarily restricts First Amendment rights.

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[18] The Illinois courts appear to have interpreted *Beauharnais* to permit the state to ban racial "propaganda", an interpretation which this court finds to be unconstitutionally broad. *See Chicago Real Estate Board* v. *City of Chicago,* 36 Ill.2d 530, 552-53 (1967); *Village of Skokie* v. *National Socialist Party,* 51 Ill.App.3d 279, 293 (1st Dist. 1977). The Illinois Supreme Court's decision vacating the injunction sustained in the latter case did not discuss *Beauharnais.*

V. *The Military Uniforms Ordinance*

Section 28-42.1 of Ordinance #996 provides that:

> "No person shall engage in any march, walk or public demonstration as a member or on behalf of any political party while wearing a military-style uniform."

A political party is defined to include any organization existing primarily to influence government or politics, §28-42.2; military-style uniform is not defined. As with Ordinance #995, violation is a misdemeanor punishable by a $500 fine and/or six months imprisonment, §28-42.4, and the Corporation Counsel is authorized to seek injunctive relief against potential violations, §28-42.3.

It is obvious that this ordinance is directed specifically at Nazi uniforms and regalia. If Skokie really meant to enforce the ordinance as written, it would prohibit, among other thnigs, an appearance by members of the American Legion in support of the candidates of the Democratic or Republican party. Nevertheless, for the purposes of this case, the court must assume that the Village meant what it said and analyze the ordinance as it is written.[19]

The use of symbolic forms of expression, including the wearing of distinctive clothing, is protected by the First Amendment. *Spence* v. *Washington,* 418 U.S. 405 (1974); *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503 (1969); *Stromberg* v. *California,* 283 U.S. 359 (1931). This ordinance therefore imposes a restriction based on the content of "speech" and must be supported by compelling governmental interests. The only reasons offered to support the ordinance are stated in the preamble: the wearing of military-style uniforms is "re-

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[19] The court expresses no opinion on whether Nazi uniforms could be banned by a properly drawn statute, but it is clear that to the extent it is intended to accomplish this purpose, the present ordinance is hopelessly overbroad.

pugnant" both to the "tradition of civilian control of government" and to "standards of morality and decency of the people of the Village of Skokie." Defendants have sought to offer no other rationale for the ordinance.

Both justifications are patently insufficient. As discussed at length above, the First Amendment embraces the freedom to advocate even that the government ought to be violently overthrown, let alone that it ought not to be controlled by civilians. Thus the banning of a symbol which is repugnant to a "tradition" which all Americans are free to reject and openly criticize is clearly unconstitutional. The reference to Skokie's standards of decency and morality is apparently an attempt to invoke the "community standards" test applied in obscenity cases, *Miller* v. *California,* 413 U.S. 15 (1973). However, to be obscene, speech must in some way be erotically stimulating, *Cohen, supra,* 403 U.S. at 20. Plaintiffs' wearing of uniforms is political speech, which, as the Court has often emphasized, "need not meet standards of acceptability." *Organization for a Better Austin* v. *Keefe, supra,* 402 U.S. at 419. The court finds Ordinance #996 to be patently and flagrantly unconstitutional on its face, and there is no need to consider the prior restraint issue posed by its enforcement through Ordinance #994.

VI. *Injunctive Relief*

Plaintiffs have requested a declaratory judgment that the three ordinances are unconstitutional, an injunction against their enforcement, and general injunctive relief against further efforts by defendants to prevent plaintiffs from exercising their First Amendment rights in Skokie. For the reasons discussed above, plaintiffs are entitled to the declaratory relief under *Steffel* v. *Thompson,* 415 U.S. 452 (1974).

In *Younger* v. *Harris,* 401 U.S. 37 (1971), the Court held that the federal courts may not enjoin an ongoing state criminal prosecution on the grounds that the statute involved is unconstitutional, both in the interests of federalism and comity and because the defendant ordinarily has an adequate remedy in the presentation of his constitutional arguments to the state court which is trying him. The only exceptions are where the criminal prosecution is the result of bad faith harassment by local law enforcement officials or the statute involved is in its entirety "patently and flagrantly violative of express constitutional prohibitions."

Steffel held that declaratory relief could still be sought where the federal action is commenced before the state prosecution actually begins. It did not deal expressly with the question of whether the federal courts may *enjoin* state criminal prosecutions before they are begun, but it stressed heavily the differences between declaratory and injunctive relief. The Court pointed out that declaratory judgments have a less intrusive effect on the operation of the state courts; that a showing of no adequate remedy at law has never been required as a prerequisite to the granting of declaratory relief; and that a declaratory judgment that a state law is vague or overbroad leaves open the possibility that prosecutors may make a good faith effort to obtain a narrowing construction in state court without risking contempt sanctions. 415 U.S. at 468-73. Since *Steffel,* it appears that a plaintiff who wishes to enjoin a threatened state criminal proceeding must make an extraordinary showing of need, but the requirement is not quite as strict as that required by *Younger* when the state proceeding has actually begun. *See Wooley* v. *Maynard,* 430 U.S. 705, 711-12 (1977).

Applying these principles, the court finds that plaintiffs are entitled to an injunction against enforcement of #996, which is clearly and patently unconstitutional in its entirety. The same cannot be said of #995, which has been found unconstitutional on vagueness and overbreadth grounds. Moreover, there is no evidence in this case of bad faith harassment on the part of defendants, with the possible exception of their enactment of Ordinance #996. Although it is apparent that Skokie and its officials are

strongly opposed to plaintiffs' presence in the Village, it appears to the court that defendants believe in good faith that plaintiffs' activities are not protected by the First Amendment. In seeking to block the proposed demonstration, defendants have acted entirely through proper legal channels, and the court takes notice that they have been commendably prompt and cooperative in submitting the issues involved in this case for judicial resolution. Accordingly, the court finds no grounds for enjoining #995 which would satisfy *Younger.* The court also finds that plaintiffs have shown no need for an injunction against "interference" with their rights in general.

Different considerations apply in the case of Ordinance #994. *Younger* applies only to judicial or quasi-judicial proceedings, not to the decisions of municipal officers whether to grant permits. As to #994, therefore, plaintiffs must only meet the ordinary prerequisites for injunctive relief. If this court denies an injunction and defendants deny plaintiffs a permit, plaintiffs must either demonstrate without one and risk criminal sanctions or bring an entirely new action to compel issuance of a permit. Neither of these options is an adequate remedy at law. Furthermore, there would inevitably be a considerable delay, and the Seventh Circuit has recently held that "even the temporary deprivation of First Amendment rights constitutes irreparable harm in the context of a suit for an injunction." *Citizens for a Better Environment* v. *City of Park Ridge,* Dkt. No. 75-1587(Sept. 8, 1975), Slip Op. at 3. Plaintiffs have made an adequate showing of need for injunctive relief as to the unconstitutional provisions of Ordinance #994.

In resolving this case in favor of the plaintiffs, the court is acutely aware of the very grave dangers posed by public dissemination of doctrines of racial and religious hatred.

In this case, a small group of zealots, openly professing to be followers of Nazism, have succeeded in exacerbating the emotions of a large segment of the citizens of the Village of Skokie who are bitterly opposed to their views and revolted by the prospect of their public appearance.

When feelings and tensions are at their highest peak, it is a temptation to reach for the exception to the rule announced by Mr. Justice Holmes, "if there is any principle of the constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."[20]

Freedom of thought carries with it the freedom to speak freely and to publicly assemble to express one's thoughts.

The long list of cases reviewed in this opinion agrees that when a choice must be made, it is better to allow those who preach racial hate to expend their venom in rhetoric rather than to be panicked into embarking on the dangerous course of permitting the government to decide what its citizens may say and hear. As Mr. Justice Harlan reminded us in *Cohen,* where a similar choice was made, "That the air may at times seem filled with verbal cacophony is . . . not a sign of weakness but of strength." The ability of American society to tolerate the advocacy even of the hateful doctrines espoused by the plaintiffs without abandoning its commitment to freedom of speech and assembly is perhaps the best protection we have against the establishment of any Nazi-type regime in this country.

It Is Hereby Ordered that final judgment enter in this cause as follows:

(1) Section 27-54, 27-56(c), 27-56(j), 28-42 through 28-42.5, both inclusive, and 28-43 through 28-43.5, both

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[20] *United States* v. *Schwimmer,* 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting).

inclusive, of the Code of Ordinances of the Village of Skokie, Illinois, as amended by Village Ordinances #77-5-N-994, #77-5-N-995 and #77-5-N-996, and each of said sections, are hereby found and declared to be inconsistent with the First and Fourteenth Amendments to the United States Constitution, and therefore unenforceable and void; and

(2) Defendants, and each of them, together with their officers, agents, employees, successors in office, and all persons acting in concert with them or under their direction, are hereby permanently enjoined from:

(a) Enforcing against plaintiffs any of Sections 27-54, 27-56(c), 27-56(j), or 28-42 through 28-42.5, both inclusive, of said Code of Ordinances; or

(b) Denying to plaintiffs any permit necessary to hold a public assembly within the Village of Skokie solely on the grounds of expected violations of any ordinance declared to be unconstitutional in this Order.

ENTER:

Bernard M. Decker

....

United States District Judge

DATED: February 23, 1978.

APPENDIX B

In The

UNITED STATES COURT OF APPEALS

For The Sixth Circuit

Nos. 78-1381 and 78-1385

Frank Collin and the National Socialist Party of America,

Plaintiffs-Appellees,

v.

Albert Smith, President of the Village of Skokie, Illinois; John N. Matzer, Jr., Village Manager of the Village of Skokie, Illinois; Harvey Schwartz, Corporation Counsel of the Village of Skokie, Illinois; and the Village of Skokie, Illinois, a municipal corporation,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois.
No. 77-C-2982—Bernard M. Decker, *Judge.*
Argued April 14, 1978—Decided *May* 22, 1978

Before Pell, Sprecher, and Wood, *Circuit Judges.*

Pell, *Circuit Judge.* Plaintiff-appellee, the National Socialist Party of America (NSPA) is a political group described by its leader, plaintiff-appellee Frank Collin, as a Nazi party. Among NSPA's more controversial and generally unacceptable beliefs are that black persons are biologically inferior to white persons, and should be expatriated to Africa as soon as possible; that American Jews have "inordinate . . . political and financial power" in the world and are "in the forefront of the international Communist revolution." NSPA members affect a uniform reminiscent of those worn by members of the German

Nazi Party during the Third Reich,[1] and display a swastika thereon and on a red, white, and black flag they frequently carry.

The Village of Skokie, Illinois, a defendant-appellant, is a suburb north of Chicago. It has a large Jewish population,[2] including as many as several thousand survivors of the Nazi holocaust in Europe before and during World War II. Other defendants-appellants are Village officials.

When Collin and NSPA announced plans to march in front of the Village Hall in Skokie on May 1, 1977, Village officials responded by obtaining in state court a preliminary injunction against the demonstration. After state courts refused to stay the injunction pending appeal, the United States Supreme Court ordered a stay, *National Socialist Party of America* v. *Village of Skokie,* 432 U.S. 43 (1977). The injunction was subsequently reversed first in part, *Village of Skokie* v. *National Socialist Party of America,* 51 Ill. App. 3d 279, 366 N.E.2d 347 (1977), and then in its entirety, *id.,* No. 49769 (Ill. S. Ct. January 27, 1978). On May 2, 1977, the Village enacted three ordinances to prohibit demonstrations such as the one Collin and NSPA had threatened.[3] This lawsuit seeks declaratory and injunctive relief against enforcement of the ordinances.

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[1] In Collin's words:

> We wear brown shirts with dark brown tie, a swastika pin on the tie, a leather shoulder strap, a black belt with buckle, dark brown trousers, black engineer boots, and either a steel helmet or a cloth cap, depending on the situation, plus a swastika arm band on the left arm and an American flag patch on the right arm.

[2] In 1974, 40,500 of the Village's 70,000 population were Jewish.

[3] The district court herein found as a matter of legislative intent that the ordinances in question were designed to cover Nazi marches. The appellants do not attack the finding.

Village Ordinance No. 77-5-N-994 (hereinafter designated for convenience of reference, as 994) is a comprehensive permit system for all parades or public assemblies of more than 50 persons.[4] It requires permit applicants to obtain $300,000 in public liability insurance and $50,000 in property damage insurance. Id., §§ 27-54, 27-56(j). One of the prerequisites for a permit is a finding by the appropriate official(s) that the assembly

> will not portray criminality, depravity or lack of virtue in, or incite violence, hatred, abuse or hostility toward a person or group of persons by reason of reference to religious, racial, ethnic, national or regional affiliation.

Id., §27-56(c). Another is a finding that the permit activity will not be conducted "for an unlawful purpose," *id.*, § 27-56(i). None of this ordinance applies to activities of the Village itself or of a governmental agency, *id.*, § 27-51, and any provision of the ordinance may be waived by unanimous consent of the Board of Trustees of the Village, *id.*, § 27-64. To parade or assemble without a permit is a crime, punishable by fines from $5 to $500. *Id.*, § 27-65.

Village Ordinance No. 77-5-N-995 (995) prohibits

> [t]he dissemination of any materials within the Village of Skokie which promotes and incites hatred against persons by reason of their race, national origin, or religion, and is intended to do so . . . .

Id., § 28-43.1. "Dissemination of materials" includes

> publication or display or distribution of posters, signs, handbills, or writings and public display of markings and clothing of symbolic significance.

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[4] Section 27-52 of the ordinance requires application for a permit at least 30 days before the proposed parade. Like some other provisions of 994, it is not challenged here. We are informed that appellees by registered letter of April 11, 1978, have applied for a permit to demonstrate on June 25, 1978.

Id., § 28-43.2. Violation is a crime punishable by fine of up to $500, or imprisonment of up to six months. *Id.*, § 28.43.4. Village Ordinance No. 77-5-N-996 (996) prohibits public demonstrations by members of political parties while wearing "military-style" uniforms, § 28.42.1, and violation is punishable as in 995.

Collin and NSPA applied for a permit to march on July 4, 1977, which was denied on the ground the application disclosed an intention to violate 996. The Village apparently applies 994 § 27-56(i) so that an intention to violate 995 or 996 establishes an "unlawful purpose" for the march or assembly. The permit application stated that the march would last about a half hour, and would involve 30 to 50 demonstrators wearing uniforms including swastikas and carrying a party banner with a swastika and placards with statements thereon such as "White Free Speech," "Free Speech for the White Man," and "Free Speech for White America." A single file sidewalk march that would not disrupt traffic was proposed without speeches or the distribution of handbills or literature.[5] Counsel for the Village advises us that the Village does not maintain that Collin and NSPA will behave other than as described in the permit application(s).

The district court, after considering memoranda, exhibits, despositions, and live testimony, issued a comprehensive and thorough opinion granting relief to Collin and NSPA. The insurance requirements of 994 were invalidated as insuperable obstacles to free speech in Skokie, and §§ 37-56(c) & (i) (the latter when used to deny permits on the basis of anticipated violations of 995 or 996) were adjudged impermissible prior restraints. Ordinance 995 was determined to be fatally vague and overbroad, and 996 was invalidated as overbroad and patently unjustified.

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[5] A renewed permit application for June 25, 1978, was sent to the Village on April 11, 1978, and contains similar recitations.

On its appeal, the Village concedes the invalidity of the insurance requirements as applied to these plaintiffs and of the uniform prohibition of 996.

I.

The conflict underlying this litigation has commanded substantial public attention and engendered considerable and understandable emotion. We would hopefully surprise no one by confessing personal views that NSPA's beliefs and goals are repugnant to the core values held generally by residents of this country, and, indeed, to much of what we cherish in civilization. As judges sworn to defend the Constitution, however, we cannot decide this or any case on that basis. Ideological tyranny, no matter how worthy its motivation, is forbidden as much to appointed judges as to elected legislators.

The record in this case contains the testimony of a survivor of the Nazi holocaust in Europe. Shortly before oral argument in this case, a lengthy and highly publicized citizenship revocation trial of an alleged Nazi war criminal was held in a federal court in Chicago, and in the week immediately after argument here, a four-part "docudrama" on the holocaust was nationally televised and widely observed. We cannot then be unmindful of the horrors associated with the Nazi regime of the Third Reich, with which to some real and apparently intentional degree appellees associate themselves.[6] Nor does the record allow us to ignore the certainty that appellees know full well that, in light of their views and the historical associations they would bring with them to Skokie, many people would find their demonstration extremely mentally and emotionally disturbing, or the suspicion that such a result may be relished by appellees.

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[6] Collin testified, however, that NSPA did not advocate genocide as a solution to the "Jewish problem" but was content to expose to the American people what his group conceived that problem to be.

But our task here is to decide whether the First Amendment protects the activity in which appellees wish to engage, not to render moral judgment on their views or tactics. No authorities need be cited to establish the proposition, which the Village does not dispute, that First Amendment rights are truly precious and fundamental to our national life. Nor is this truth without relevance to the saddening historical images this case inevitably arouses. It is, after all, in part the fact that our constitutional system protects minorities unpopular at a particular time or place from governmental harassment and intimidation, that distinguishes life in this country from life under the Third Reich.

Before undertaking specific analysis of the clash between the Village ordinances and appellees' desires to demonstrate in Skokie, it will be helpful to establish some general principles of pertinence to the decision required of us. Putting to one side for the moment of question of whether the content of appellees' views and symbols makes a constitutional difference here, we find we are unable to deny that the activities in which the appellees wish to engage are within the ambit of the First Amendment.

These activities involve the "cognate rights" of free speech and free assembly. See *Thomas* v. *Collins,* 323 U.S. 516, 530 (1945). "[T]he wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment." *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503, 505 (1969). Standing alone, at least, it is "closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment."[7] *Id.* at 505-06. The same thing can be said of NSPA's intended display of a party flag, *see Stromberg* v. *California,* 283 U.S. 359 (1931), and of the messages intended for the placards party members would carry. *See, e.g., Cohen* v. *California,* 403 U.S. 15, 18 (1971). Likewise, although marching, parading, and picketing, because they involve conduct implicating significant interests in maintaining public order, are less protected than pure speech, *Shuttlesworth* v. *Birmingham,* 394 U.S. 147, 152 (1969); *Cox* v. *Louisiana,* 379 U.S. 536, 554-55 (1965), they are nonetheless subject to significant First Amendment protection. *Grayned* v. *City of Rockford,* 408 U.S. 104, 115 (1972); *Shuttlesworth, supra,* 394 U.S. at 152; *Cox, supra,* 379 U.S. at 545-46. Indeed, an orderly and peaceful demonstration, with placards, in the vicinity of a seat of government, is "an exercise of [the] basic constitutional rights of [speech, assembly, and petition] in their most pristine and classic form." *Edwards* v. *South Carolina,* 372 U.S. 229, 235 (1963).

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[7] Because the armbands are to be worn during a group demonstration, *see id.* at 508, their display cannot stand entirely alone. On the other hand, it is worth noting that the display of tie pins, armbands, or a flag here, is not an example of pure conduct that is asserted to have expressive value, which may be somewhat more easily regulated. *See United States* v. *O'Brien,* 391 U.S. 367 (1968).

No doubt, the Nazi demonstration could be subjected to reasonable regulation of its time, place, and manner. *Police Department of Chicago* v. *Mosley,* 408 U.S. 92, 98 (1972); *Grayned, supra,* 408 U.S. at 115-16; *Adderley* v. *Florida,* 385 U.S. 39 (1966); *Cox, supra,* 379 U.S. at 554-55. Although much of the permit system of 994 is of that nature, the provisions attacked here are not. No objection is raised by the Village, in ordinances or in their proofs and arguments in this case, to the suggested time, place, or manner of the demonstration, except the general assertion that in the place of Skokie, in these times, *given the content of appellees' views and symbols,* the demonstration and its symbols and speech should be prohibited.[8] Because

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[8] Thus these are not appropriately narrow ordinances, criminalizing, *e.g.,* the invasion of residential neighborhoods by sound trucks blaring racial epithets or other messages, *see Kovacs* v. *Cooper,* 336 U.S. 77 (1949), or the menacing by uniformed bullies of a survivor of the holocaust, or anyone else, on the street, or at his or her residence, *see Rowan* v. *Post Office Department,* 397 U.S. 728

the ordinances turn on the content of the demonstration, they are necessarily not time, place, or manner regulations. *Mosley, supra* at 99; *Konigsberg* v. *State Bar of California,* 366 U.S. 36, 50-51 (1961).

Legislating against the content of First Amendment activity, however, launches the government on a slippery and precarious path:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. *Cohen* v. *California,* 403 U.S. 15, 24 (1971); *Street* v. *New York,* 394 U.S. 576 (1969); *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 269-70 (1964), and cases cited; *NAACP* v. *Button,* 371 U.S. 415, 445 (1963); *Wood* v. *Georgia,* 370 U.S. 375, 388-389 (1962); *Terminiello* v. *Chicago,* 337 U.S. 1, 4 (1949); *De Jonge* v. *Oregon,* 299 U.S. 353, 365 (1937). To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan, supra,* at 270.

Mosley, supra at 95-96.

This is not to say, of course, that content legislation is *per se* invalid. Chief Justice Burger concurred in *Mosley,* at 102-03, just to point out the established exceptions to such a rule, namely obscenity, fighting words, and, as limited by constitutional requirements, libel. Likewise, in very narrow circumstances, a government may proscribe content on the basis of imminent danger of a grave substantive evil. *Brandenburg* v. *Ohio,* 395 U.S. 444, 447 (1969) (per curiam); *Terminiello* v. *Chicago,* 337 U.S. 1, 4 (1949). But analysis of content restrictions must begin with a healthy respect for the truth that they are the most direct threat to the vitality of First Amendment rights.

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[8] (Continued)

(1970), and we decline to treat them viscerally as if such were their scope. Logically, we consider only whether *these* ordinances can prohibit the type of conduct and content this case involves.

II.

We first consider ordinance 995, prohibiting the dissemination of materials which would promote hatred towards persons on the basis of their heritage. The Village would apparently apply this provision to NSPA's display of swastikas, their uniforms, and, perhaps, to the content of their placards.[9]

The ordinance cannot be sustained on the basis of some of the more obvious exceptions to the rule against content control. While some would no dooubt be willing to label appellees' views and symbols obscene, the constitutional rule that obscenity is unprotected applies only to material with erotic content. *Cohen* v. *California, supra,* 403 U.S. at 20. Furthermore, although the Village introduced evidence in the district court tending to prove that some individuals, at least, might have difficulty restraining their reactions to the Nazi demonstration, the Village tells us that it does not rely on a fear of responsive violence to justify the ordinance, and does not even suggest that there will be any physical violence if the march is held.[10] This concession takes this case out of the scope of *Brandenburg* v. *Ohio, supra,* and *Feiner* v. *New York,* 340 U.S. 315, 321 (1951) (intentional "incitement to riot" may be prohibited). The Village does not argue otherwise.

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[9] Collin, at least, in his verified complaint, alleged that Village officials advised him that this and the other ordinances would be applied to his and NSPA's proposed demonstration, and the Village has never suggested that this ordinance might not be applied thereto.

[10] The Village understandably offers no guarantee that there will not be violence, but commendably advises us that if a final order in this case requires it to permit the march, it will make every effort to protect the demonstrators (and the Village) from responsive violence.

The concession also eliminates any argument based on the fighting words doctrine of *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942) The Court in *Chaplinsky* affirmed a conviction under a statute that, as authoritatively construed, applied only to words with a direct tendency to cause violence by the persons to whom, individually, the words were addressed. *Id.* at 573. A conviction for less than words that at least tend to incite an immediate breach of the peace cannot be justified under *Chaplinsky.*[11] *Gooding* v. *Wilson,* 405 U.S. 518, 524-27 (1972). The Illinois Supreme Court, in *Village of Skokie* v. *National Socialist Party of America, supra,* has squarely ruled that responsive violence fears and the fighting words doctrine could not support the prohibition of appellees' demonstration. Although that decision was in a prior restraint context, and we are here considering only the post facto criminal aspects of 995, the decision does buttress our conclusion that *Chaplinsky* does not cover this case. Again, the Village does not seriously contest this point.

Four basic arguments are advanced by the Village to justify the content restrictions of 995. First, it is said that the content criminalized by 995 is "totally lacking in social content," and that it consists of "false statements of fact" in which there is "no constitutional value." *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 340 (1974). We disagree that, if applied to the proposed demonstration, the ordinance can be said to be limited to "statements of fact," false or otherwise. No handbills are to be distributed; no speeches are planned. To the degree that the symbols in question can be said to assert anything specific, it must be the Nazi ideology, which cannot be treated as a mere false "fact."

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[11] Because the ordinance does not even refer to such a breach, the ordinance would inevitably fall, if *Chaplinsky* were its basis, because of overbreadth and vagueness. *See Gooding, supra.*

We may agree with the district court that

> if any philosophy should be regarded as completely unacceptable to civilized society, that of plaintiffs, who, while disavowing on the witness stand any advocacy of genocide, have nevertheless deliberately identified themselves with a regime whose record of brutality and barbarism is unmatched in modern history, would be a good place to start.

But there can be no legitimate start down such a road.

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

Gertz, supra at 339-40 (footnote omitted). In the words of Justice Jackson, "every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." *Thomas* v. *Collins, supra,* 323 U.S. at 545 (concurring opinion). The asserted falseness of Nazi dogma, and, indeed, its general repudiation, simply do not justify its suppression.

The Village's second argument, and the one on which principal reliance is placed, centers on *Beauharnais* v. *Illinois,* 343 U.S. 250 (1952). There a conviction was upheld under a statute prohibiting, in language substantially (and perhaps not unintentionally) similar[12] to that used in the ordinance here, the dissemination of materials promoting racial or religious hatred. The closely-divided Court stated that the criminal punishment of libel of an *individual* raised no constitutional problems, relying on *Chaplinsky* v. *New Hampshire, supra,* 315 U.S. at 571-72:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words . . . . [S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Quoted at 343 U.S. 255-57. That being so, the Court reasoned that the state could constitutionally extend the prohibition to utterances aimed at groups.

In our opinion *Beauharnais* does not support ordinance 995, for two independent reasons. First, the rationale of that decision turns quite plainly on the strong tendency of the prohibited utterances to cause violence and disorder. The Illinois Supreme Court had so limited the statute's application, as the United States Supreme Court noted. *Id. at* 254. The latter Court also pointed out that the tendency to induce breach of the peace was the traditional justification for the criminal libel laws which had always been thought to be immune from the First Amendment. *Id.* After stating the issue (whether Illinois could extend criminal libel to groups) the Court turned to Illinois' history of racial strife "and its frequent obligato of extreme racial and religious propoganda," *id.* at 261, and concluded that the Illinois legislature could reasonably connect strife and the propaganda and criminalize the latter to prevent the former. *Cantwell* v. *Connecticut,* 310 U.S. 296, 310 (1940), was quoted, at 261:

> The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit *would incite violence and breaches of the peace* in order to deprive others of their equal right to the

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[12] The actual language in *Beauharnais, see id.* at 251, invoked specifically the depiction of criminality, depravity, unchastity, or lack of virtue in target groups, and is thus most like the language of 994 § 27-56(c), discussed *infra.*

> exercise of their liberties,[13] is emphasized by events familiar to all. These and other transgressions of [the limits to First Amendment rights] the States appropriately may punish. [Emphasis added.]

It may be questioned, after cases such as *Cohen* v. *California, supra; Gooding* v. *Wilson, supra; and Brandenburg* v. *Ohio, supra,* whether the *tendency to induce violence* approach sanctioned implicitly in *Beauharnais* would pass constitutional muster today. Assuming that it would, however, it does not support ordinance 995, because the Village, as we have indicated, does not assert appellees' possible violence, an audience's possible responsive violence, or possible violence against third parties by those incited by appellees, as justifications for 995. Ordinance 995 would apparently be applied in the absence of any such threat. The rationale of *Beauharnais,* then, simply does not apply here.

Further, when considering the application of *Beauharnais* to the present litigation, we cannot be unmindful of the "package" aspects of the ordinances and that the "insulting" words are to be made public only after a 30-day permit application waiting period. Violence occurring under such a circumstance would have such indicia of premeditation as to seem inconsistent with calling into play any remaining vitality of the *Beauharnais* rationale.

The Village asserts that *Beauharnais* implicitly sanctions prohibiting the use of First Amendment rights to invoke racial or religious hatred *even without reference to*

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[13] It bears noting that we are *not* reviewing here a law which prohibits action designed to impede the equal exercise of guaranteed rights, *see e.g.,* 18 U.S.C. §§ 241, 245, or even a conspiracy to harass or intimidate others and subject them thus to racial or religious hatred. *See Beauharnais, supra* at 284 (Douglas J., dissenting). If we were, we would have a very different case.

fears of violence.[14] In the light of our discussion of *Beauharnais'* premises, we do not find the case susceptible of this interpretation.[15] Even if it were, however, we agree with the district court that decisions in the quarter-century since *Beauharnais* have abrogated the *Chaplinsky* dictum, made one of the premises of *Beauharnais,* that the punishment of libel "has never been thought to raise any Constitutional problem." *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964); *Garrison* v. *Louisiana,* 379 U.S. 64 (1964) (criminal libel); and *Gertz* v. *Robert Welch, Inc., supra,* are indisputable evidence that libel does indeed now raise serious and knotty First Amendment problems, sufficient as a matter of constitutional law to require the substantial rewriting of both criminal and civil state libel laws.

The Eighth Circuit, *Tollett* v. *United States,* 485 F.2d 1087, 1094 n.14 (8th Cir. 1973), and Judge Wright of the District of Columbia Circuit, *Anti-Defamation League of B'nai B'rith* v. *Federal Communications Commission,* 403 F.2d 169, 174 n.5 (D.C. Cir. 1968) (concurring opinion), *cert. denied,* 394 U.S. 930 (1969), have expressed doubt, which we share, that *Beauharnais* remains good law at all after the constitutional libel cases. *Cf. Vanasco* v. *Schwartz,* 401 F.Supp. 87, 94 (E.D.N.Y. 1975), *aff'd,* 423 U.S. 1041 (1976). We agree at least this far: If 995 is to be sustained, it must be done on the basis of the Village's interest asserted, and the conduct to which 995 applies, not on the basis of blind obeisance to uncertain implications from an opinion issued years before the Supreme Court itself rewrote the rules.

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[14] The district court found this reading of *Beauharnais* to be at least plausible, relying to some degree on the Court's statement that as libelous utterances were not within the area of protected speech, it was unnecessary "to consider the issues behind the phrase 'clear and present danger.' " 343 U.S. at 266. That statement, however, was a logical examination from the conclusion that criminal libel lacked First Amendment protection which conclusion was premised in turn on the tendency to incite violence that justified criminal libel law. We do not read it as establishing an alternative ground of decision.

[15] We also note that we have found nothing in Supreme Court opinions after *Beauharnais* to support this interpretation. Indeed, in both *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 268 (1964); and *Garrison* v. *Louisiana,* 379 U.S. 64, 70 (1964), the Court's brief references to *Beauharnais* treated it as a case involving a likelihood of violence.

The Village's third argument is that it has a policy of fair housing, which the dissemination of racially defamatory material could undercut. We reject this argument without extended discussion. That the effective exercise of First Amendment rights may undercut a given government's policy on some issue is, indeed, one of the purposes of those rights. No distinction is constitutionally admissible that turns on the intrinsic justice of the particular policy in issue.

The Village's fourth argument is that the Nazi march, involving as it does the display of uniforms and swastikas, will create a substantive evil that it has a right to prohibit: the infliction of psychic trauma on resident holocaust survivors and other Jewish residents.[16] The Village points out that Illinois recognizes the "new tort" of intentional infliction of severe emotional distress *see Public Finance Corporation* v. *Davis,* 66 Ill. 2d 85, 360 N.E.2d 765 (1976); and *Knierim* v. *Izzo,* 22 Ill. 2d 73, 174 N.E.2d 157 (1961), the coverage of which may well include personally directed racial slurs, *see Contreras* v. *Crown Zellerbach Corporation,* 88 Wash. 2d 735, 565 P.2d 1173 (1977). Assuming that specific individuals could proceed in tort under

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[16] Ironically the witnessing of the television show "Holocaust might seem to have the same trauma producing possibilities. The extent to which the residents of Skokie may have willingly exposed themselves to the painful reminders of this production might have been pertinent to the psychic trauma issue if the airing had occurred prior to the district court evidentiary hearing.

this theory to recover damages provably occasioned by the proposed march, and that a First Amendment defense would not bar the action,[17] it is nonetheless quite a different matter to criminalize protected First Amendment conduct in anticipation of such results.

It would be grossly insensitive to deny, as we do not, that the proposed demonstration would seriously disturb, emotionally and mentally, at least some, and probably many of the Village's residents. The problem with engrafting an exception on the First Amendment for such situations is that they are indistinguishable in principle from speech that "invite[s] dispute . . . . induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello* v. *Chicago,* 337 U.S. 1, 4 (1949). Yet these are among the "high purposes" of the First Amendment. *Id.* It is perfectly clear that a state may not "make criminal the peaceful expression of unpopular views." *Edwards* v. *South Carolina,* supra, 372 U.S. at 337. Likewise, "mere public intolerance or animosity cannot be the basis for abridgement of these constitutional freedoms." *Coates* v. *City of Cincinnati,* 402 U.S. 611, 615 (1971). Where, as here, a crime is made of a silent march, attended only by symbols and not by extrinsic conduct offensive in itself, we think the words of the Court in *Street* v. *New York, supra,* 394 U.S. at 592, are very much on point:

> [A]ny shock effect . . . must be attributed to the content of the ideas expressed. It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers. [Citations omitted.]

It is said that the proposed march is not speech, or even "speech plus," but rather an invasion, intensely menacing no matter how peacefully conducted. The Village's expert psychiatric witness, in fact, testified that the effect of the march would be much the same regardless of whether uniforms and swastikas were displayed, due to the intrusion of self-proclaimed Nazis into what he characterized as predominately Jewish "turf." There is room under the First Amendment for the government to protect targeted listeners from offensive speech, but only when the speaker intrudes on the privacy of the home, or a captive audience cannot practically avoid exposure. *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 209 (1975); *and see Rowan* v. *Post Office Department, supra; Lehman* v. *City of Shaker Heights,* 418 U.S. 298 (1974). The Supreme Court has

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[17] These questions, of course, are not before us, and we intimate no views thereon, one way or the other.

> consistently stressed that "we are often 'captives' outside the sanctuary of the some and subject to objectionable speech." [Citing *Rowan, supra* at 738.] The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. *Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.* [Emphasis added.]

Cohen v. *California, supra,* 403 U.S. at 21.

This case does not involve intrusion into people's homes. There *need be* no captive audience, as Village residents may, if they wish, simply avoid the Village Hall for thirty minutes on a Sunday afternoon,[18] which no doubt would be their normal course of conduct on a day when the Village Hall was not open in the regular course of business. Absent such intrusion or captivity, there is no justifiable substantial privacy interest to save 995 from constitutional infirmity, when it attempts, by fiat, to declare the entire Village, at all times, a privacy zone that may be sanitized from the offensiveness of Nazi ideology and symbols.

We conclude that 995 may not be applied to criminalize the conduct of the proposed demonstration. Because it is susceptible to such an application, we also conclude that it suffers from substantial overbreadth, even if some of the purposes 995 is said to serve might constitutionally be protectible by an appropriate and narrower ordinance. *See Cox* v. *Louisiana, supra* The latter conclusion is also supported by the fact that the ordinance could conceivably be applied to criminalize dissemination of *The Merchant of Venice* or a vigorous discussion of the merits of reverse racial discrimination in Skokie. Although there is reason to think, as the district court concluded, that the ordinance is fatally vague as well, because it turns in part on subjective reactions to prohibited conduct, *see Coates* v. *City of Cincinnati, supra;* and *Ashton* v. *Kentucky,* 384 U.S. 195 (1966), we do not deem it necessary to rest our decision on that ground.

III.

Our decision that 995 cannot constitutionally be applied to the proposed march necessarily means that a permit for the march may not be denied on the basis of anticipated violations thereof. *See* 994 § 27-56(i), quoted above. We turn to the question of whether the similar provision built into 994, by § 27-56(c), can be the basis of a permit denial.

The answer really follows with even greater strength from our conclusion on 995. Because 994 § 27-56(c) gives to Village "officials the power to deny use of a forum in advance of actual expression," *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546, 553 (1975), it is a prior restraint, *id.,* which thus "comes to this Court with a 'heavy presumption' against its constitutional validity." *Organi-*

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[18] We appreciate that, as the Village's expert psychiatrist testified, avoidance might also be psychologically unsatisfying to some of the Village's residents. Nonetheless, the choice will be theirs, and it meaningfully undercuts the invasion of privacy justification for 995. *See Erznoznik, supra* at 210-11; *Cohen, supra* at 21.

zation for a Better Austin v. *Keefe,* 402 U.S. 415, 419 (1971).

> The presumption against prior restraints is heavier —and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand.

Southeastern Promotions, supra at 558-59. The slightly more specific language of § 27-56(c) than that which 995 contains might cut against finding the former provision unconstitutionally vague, but there is otherwise no meaningful difference between the two provisions except the element of prior restraint. The requested parade permit cannot be denied on the basis of § 27-56(c).

IV.

As we have indicated, the Village has conceded that 996 is unconstitutional. We agree, and affirm the district court in this respect as well.

The Village has also conceded that the insurance requirements of 994 §§ 27-54, 27-56(j) *cannot be applied* to appellees' proposed demonstration.[19] The district court,

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[19] Judge Sprecher's thorough discussion of the contrary position is somewhat surprising, in view of the Village's total failure to attempt to defend application of the insurance requirement. Surely *Mitchell* v. *Archibald & Kendall, Inc.,* No. 77-2216 (7th Cir. March 2, 1978) (alternate holding), does not support the conclusion that a reviewing court should reach out to salvage non-jurisdictional defenses conceded after trial to be invalid. The concession in issue there was for the purposes of an appeal from a dismissal of a complaint. Obviously such a concession would not waive a later invocation of a defense, if further proceedings had been required. Moreover, the dissent's quotation from *Mitchell* significantly omits the

however, found the requirements to be insuperable obstacles to free speech in Skokie, subject to discretionary waiver explicitly or by Village co-sponsorship,[20] *see Shuttlesworth* v. *Birmingham, supra; Police Department of Chicago* v. *Mosley, supra,* 408 U.S. at 97, and thus unconstitutional *on its face.* Appellees urge us to affirm the district court's conclusion, and not to accept the more limited concession offered by the Village.

Appellees proved in the district court that they could not obtain the requisite insurance, and also that, in the opinion of their expert, insurance would typically be unavailable to those very controversial groups as to which the Village's interest in having insurance would presumably be the greatest. This expert testimony comports with the teachings of common sense, and, when combined with the discretionary waiver feature in 994, might well justify our reaching the broader conclusion appellees urge on us.

On the other hand, we do not need to determine now that no insurance requirement could be imposed in any circumstances, which would be a close question, in our view. The present case does not require us to reach out to decide this issue on a broad basis. Appellees will receive all the relief they have requsted and to which they are entitled on either ground. Accordingly, we accept the Village's concession that the insurance requirement cannot be applied here.[21] which is plainly mandated by the record and the pertinent case law, and affirm the judgment as it bears on §§ 27-54 and 27-56(j) on that basis.

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[19] (Continued)
substance of both the concession (that the plaintiff was at the date and time of his injury an invitee *to be on defendant's premises*) and the defense (that plaintiff could not invoke the legal *duties owed to an invitee* for injury incurred *off the premises* and on a public street). The latter position, indeed, was strenuously urged on appeal, although the defendant did not in terms articulate the legal theory that plaintiff had thus ceased to be an invitee.

[20] The court also found that the co-sponsorship device had in fact been used to allow parades by "acceptable" organizations which did not satisfy the insurance requirement. That the parades in question were of the type traditionally found acceptable by municipalities, including Skokie, does not change the fact that the Village has created and used a device to exempt parades it has regarded as acceptable from the burdens of the insurance requirement, in its discretion.

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[21] The dissent's implication that we ought to wait to see exactly how and whether the Village would apply the requirements to appellees is unacceptably academic. The history of this litigation gives no reason at all to assume that the Village would gratuitously waive the requirements for these plaintiffs, and if the Village knew of some way to aid plaintiffs' search for commercial insurance, one might have expected it at some point in this litigation to say so. It has not, and plaintiffs' evidence that insurance is unavailable to them stands entirely uncontradicted. The suggestion that insurance maintained by the Village might be made available to plaintiffs is incredible: if a policy exists that would cover public liability for the proposed demonstration, what conceivable justification can there be for §§ 27-54 and 27-56(j)? If any existing policy would not now cover the demonstration, surely the Village will not be able even if it were willing unilaterally to extend coverage. The consent of the insurer would be required, and the evidence adduced herein gives us every reason to doubt it would be forthcoming. Not worthy of comment is the possibility that the Village might generously decide that plaintiffs could purchase their First Amendment rights with a bond of some $300,000 of their own money in lieu of insurance.

We have, because of the dissent's position on the matter of the insurance ordinance, revised the original draft of this opinion to advert to what appear to us to be some of the more patent frailties of this non-controverted judicially revived issue. We have not because of our belief in the lack of real substance to the issue pursued other rather obvious difficulties presented by the particular

Relying on United States 1. O'Brien, supra, Judge Sprecher would uphold the "facially neutral" insurance requirement. It is true that the requirement does not turn on the content of a proposed demonstration, except in the sense that controversial groups will likely be unable to obtain insurance, as here. (That several less controversial groups were able to do so, of course, proves nothing.) But it is most assuredly not facially neutral towards First Amendment activity, which is what *O'Brien* requires. *O'Brien* was convicted of destroying his draft card. The pertinent statute, which the Court found important to the efficient operation of the Selective Service System, criminalized nothing more, and in no way restricted the right to speak or demonstrate against the draft or the Vietnam War. The Court emphasized that the statute "on its face deals with conduct *having no connection with speech* . . . ." 391 U.S. at 375 (emphasis added). The *O'Brien* test, then, deals only with situations where such nonspeech conduct is entwined with speech elements and a restriction on that conduct creates merely "incidental limitations" on protected activity. *Id.* at 376. The limitations here totally and directly prohibit the First Amendment activity; calling them "incidental" manner restrictions does not make them so. *See id.* at 382. Moreover, *O'Brien* did not involve a prior restraint, nor does the dissent's analysis give more than cursory recognition to the increased burden of justifying such restraints.

Even if *O'Brien's* test could somehow be applied here, the use of the insurance requirement to prohibit the proposed demonstration would fail it. First, it is difficult, following even a casual examination of the chronological exegesis of the ordinances, particularly in light of the religious complexion of the Village, to think other than that the governmental interest here was directly related to the suppression of these plaintiffs' First Amendment rights. Second, the governmental interest advanced by the dissent could more narrowly be served by criminalizing, as has no doubt already been done, the conduct (by appellees or others) directly producing any feared injury to person or property and by marshalling local, county, and state police to prevent violations. *See id.* at 381-82 ("both the governmental interest and the operation [of the statute] are limited to the noncommunicative aspect of O'Brien's conduct"), 382 ("[f]or the noncommunicative impact of his conduct, and for nothing else, he was convicted"). Instead, the Village has flatly prohibited First Amendment activity, not itself directly productive of the feared injury, by those too controversial to obtain commercial insurance.

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[21] (Continued)

ordinance such as its vagueness. Who is the insured? Is the Village to be an additional insured? If the insured parties are to be the plaintiffs how under established insurance law could the plaintiffs assert any claims for injuries they might receive?

Cox v. *New Hampshire,* 312 U.S. 569 (1941), is also inapposite, both because it involved permit fees carefully designed only to help the town in question defray actual costs incurred in parades, and because there was, in the circumstances of that case, no basis to assume the statute "would be applied so as to prevent peaceful picketing . . . ." *Id.* at 578.

We think the implication in Judge Sprecher's opinion that the district court and this court have engaged in an unseemly "rush" to judgment is without support. The case was before the district court for over six months, and neither party has suggested that this time period was in any way too short to allow the development of a full record and ample argumentation thereon. This court, en banc, did order an accelerated briefing schedule, and an early decision. We have endeavored to expedite decision, because to delay the exercise of First Amendment rights in itself burdens them and may risk their destruction. *See Shuttlesworth* v. *Birmingham, supra,* 394 U.S. at 162-63 (Harlan, J., concurring); *Walker* v. *City of Birmingham,* 388 U.S. 307, 349 (1967) (Brennan, J., dissenting), and cases cited. Appellees' proposed demonstration has already been delayed over a year.

The preparation and issuance of this opinion has not been an easy task, or one which we have relished. Recognizing the implication that often seems to follow overprotestation, we nevertheless feel compelled once again to express our repugnance at the doctrines which the appellees desire to profess publicly. Indeed, it is a source of extreme regret that after several thousand years of attempting to strengthen the often thin coating of civilization with which humankind has attempted to hide brutal animal-like instincts, there would still be those who would resort to hatred and vilification of fellow human beings because of their racial background or their religious beliefs, or for that matter, because of any reason at all.

Retaining meaning in civil rights, particularly those many of the founding fathers believed sufficiently important as to delay the approval of the Constitution until they could be included in the Bill of Rights, seldom seems to be accomplished by the easy cases, however, and it was not so here.

Although we would have thought it unnecessary to say so, it apparently deserves emphasis in the light of the dissent's reference to this court apologizing as to the result, that our *regret* at the use appellees plan to make of their rights is not in any sense an *apology* for upholding the First Amendment. The result we have reached is dictated by the fundamental proposition that if these civil rights are to remain vital for all, they must protest not only those society deems acceptable, but also those whose ideas it quite justifiably rejects and despises.

The judgment of the district court is

AFFIRMED.

WOOD, *Circuit Judge,* concurring.

Agreeing with Judge Pell's analysis of the law, I join in affirming the judgment of the district court and add only a few footnotes.

I would in addition adopt the finding of the district court that Ordinances 995 and 996 are unconstitutionally vague and overbroad as criminal statutes.

Since there is ample warning of the proposed event, this situation is not equivalent to the sudden and unfounded cry of "fire" in a crowded and unsuspecting theatre to which it is sometimes analogized.

Recognition of the full scope of freedom of speech does not compel anyone to listen, or if listening to believe.

It may also be well to remember that often "words die away, and flow off like water—leaving no taste, no color, no smell, not a trace."* Any exception, however, to the First Amendment which we might be tempted to fashion for these particular persuasive circumstances would not "die away." It would remain a dangerous and unmanageable precedent in our free and open society.

SPRECHER, *Circuit Judge*, concurring in part and dissenting in part.

The basic situation in this case—the efforts of avowed and uniformed Hitlerian Nazis to demonstrate without municipal regulations in the streets of a predominantly Jewish village housing some 7,000 Jewish survivors of World War II and their families—conjures up a unique amalgam of complex First Amendment concepts such as prior restraint, group libel, fighting words and hostile audiences, incitement to riot, and shouting "fire" in a crowded theater. Seldom before has a federal court been faced with a situation raising such powerful cross-pressures as have been created in this case. For instance, the fact that it now seems to be instilled in Jewish culture to confront threatened oppression with active resistance and aggressive retaliation differentiates this case factually from *Terminiello* v. *Chicago*, 337 U.S. 1 (1949). With a situation that is so unique, it is important to keep in mind Mr. Justice Steven's admonition from one of the most recent First Amendment cases that "[e]ven within the area of protected speech, a difference in content may require a different governmental response." *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976). There may very well be a necessity for a new balancing of values in these circumstances as opposed to the immediate governmental paralysis which is supposed to occur when the rubric of "prior restraint" is sounded.

These are important considerations which at least demand full and unhurried attention which is no longer available in these cases. *New York Times Co.* v. *United States*, 403 U.S. 713, 748-63 (1971) (dissenting opinions of Chief Justice Burger, Mr. Justice Harlan and Mr. Justice Blackmun). Difficult constitutional questions show the necessity for a court to take the time required to thoroughly research the assumptions underlying previous decisions as well as to consider a careful and possibly new analytical approach to such cases. See *Lucas* v. *Wisconsin Electric Power Co.*, 466 F.2d 638, 658-72 (7th Cir. 1972). The prophetic words of Mr. Justice Holmes in his dissent in *Northern Securities Co.* v. *United States*, 193 U.S. 197, 400-401 (1904) become more pertinent with the passage of time:

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a find of hydraulic pressure . . .

Unique First Amendment controversies require an attempt to consider unique approaches. The very cases which, like the present one, cry for plenary and pensive consideration are dealt with in a feverish haste under great pressure, oftentimes of a court's own making. It is, therefore, with some hesitancy and much concern that I approach the instant case. My wariness is enhanced by the fact that each court dealing with these precise problems (the Illinois Supreme Court, the District Court and this Court) feels the need to apologize for its result.

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* Alexander Solzhenitsyn, *Nobel Lecture*, 1972.

Finally, my problems with the case have been enlarged by the wholesale concessions made by the Village officials.

I

On May 2, 1977, the Village of Skokie (Village) enacted three ordinances relating to public assemblies and parades. The first, #994, is a comprehensive permit system for all public assemblies which are to include more than 50 persons or vehicles. The second, #995, prohibits the dissemination of material which promotes and incites racial or religious hatred with the intent to incite such hatred. The third, #996, prohibits public demonstrations by members of political parties wearing military-style uniforms.[1] These last two ordinances are both criminal measures and also are read into and enforced through the permit mechanism of #994.[2]

On June 2, 1977, plaintiffs Frank Collin and the National Socialist Party of America applied for a permit

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[1] The key provisions are:

#994—Sec. 27-56(c): A permit will issue if

The conduct of the parade, public assembly, or similar activity will not portray criminality, depravity or lack of virtue in, or incite violence, hatred, abuse or hostility toward a person or group of persons by reason of reference to religious, racial, ethnic, national or regional affiliation.

#995—Sec. 28-43.1:

The dissemination of any materials within the Village of Skokie which promotes and incites hatred against persons by reason of their race, national origin, or religion, and is intended to do so, is hereby prohibited.

#996—Sec. 28-42.1:

No person shall engage in any march, walk or public demonstration as a member or on behalf of any political party while wearing a military-style uniform.

[2] A provision of Ordinance #994, Section 27-56(c), requires that a permit be denied to assemblies which will engage in activities substantially similar to those prohibited by #995. A catch-all provision, section 27-56(i), serves the same purpose for #996.

under Ordinance #994. This application was denied by the Village on June 27, 1977, because it violated Ordinance # 996 in that Collin wanted to hold a public demonstration while wearing military-style uniforms. Plaintiffs filed suit attacking the constitutionality of these ordinances. The district court found portions of Ordinance #994 and all of Ordinances #995 and #996 to be facially unconstitutioanl and the court granted declaratory and injunctive relief. The Village appeals from that decision.

II

A prerequisite to obtaining a permit under Ordinance #994 for a public assembly of greater than 50 persons is provided in section 27-54:

> No permit shall be issued to any applicant until such applicant procures Public Liability Insurance in an amount of not less than Three Hundred Thousand Dollars ($300,000.00) and Property Damage Insurance of not less than Fifty Thousand Dollars ($50,000.00). Prior to the issuance of the permit, certificates of such insurance must be submitted to the Village Manager for verification that the company issuing such insurance is authorized to do business and write policies of insurance in the State of Illinois.

This requiremeent is enforced through section 27-56(j) and may be waived by a unanimous vote of the President and Board of Trustees of the Village under section 27-64.

The district court held this provision to be unconstitutional and the majority here affirms that conclusion.[3] I disagree and respectfully dissent from that part of the majority opinion.

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[3] On appeal defendants conceded the invalidity of the insurance requirements insofar as they are applicable to the plaintiffs in this case (Defendants-Appellants Brief p. 4). This court has previously recognized in another context that "[w]e do not regard the defendant-appell[ants'] concession . . . as an irrevocable waiver of its de-

An analysis of the insurance requirement begins with the assumption that plaintiffs' proposed activities are protected under the First Amendment.[4] First Amendment activities, however, do not escape all restraint or regulation. "Reasonable regulations of the time, place, and manner of protected speech, where those regulations are necessary to further significant governmental interests, are permitted by the First Amendment." *Young* v. *American Mini Theatres, Inc.,* 427 U.S. 50, 63 n.18 (1976).

There is no dispute with plaintiffs' claim that the insurance requirement of the permit ordinance is a "prior restraint" on their freedom to assemble and march. It must be emphasized, however, that this label is merely an aid to categorization of First Amendment restraints and not a conclusion that those restraints are *per se* invalid.[5] Indeed, all permit or licensing systems regulating First Amendment activities are "prior restraints" in this sense.

The insurance ordinance in question here is a restriction on the manner is which assemblies may take place in the Village of Skokie without regard to their content. The test for an ordinance which incidentally affects First Amendment rights was succinctly stated in *United States* v. *O'Brien,* 391 U.S. 367, 377 (1968):

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

While plaintiffs do not claim that the first of the requirements is unfulfilled, the others raise some questions.

The district court used as one basis for voiding the ordinance the conclusion that the insurance requirement was not "directly related to the accomplishment of legitimate governmental purposes," which is a paraphrase of the second requirement of the *O'Brien* test. The protection of the safety and the property rights of its citizens, however, is not only a proper subject for the exercise of a municipality's authority, but a local government would be remiss if it did not provide these fundamental protections. In *Cox* v. *New Hampshire,* 312 U.S. 569 (1941), the Supreme Court upheld an assembly permit ordinance which provided for a graduated fee schedule up to a maximum of $300, depending on the costs of administering and policing an assembly. The Court stated at 574:

> Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself

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[3] (Continued)
fense . . . " *Mitchell* v. *Archibald & Kendall, Inc.,* No. 77-2216 (7th Cir. March 2, 1978), at 16.I believe that this conclusion is particularly appropriate where the concession is used to avoid an important constitutional question that was fully considered and resolved by the district court and thoroughly briefed before us by the party urging the unconstitutionality of the statute.

[4] Whether this activity *is* protected at all by the First Amendment and what degree of protection should be afforded are discussed in Parts III and IV, *infra.*

[5] The cry of "prior restraint" is a classic example of the tyranny of words which often accompanies the uncritical employment of a once-useful phrase. As Mr. Justice Frankfurter noted in *Tiller* v. *Atlantic Coast Line R.R.,* 318 U.S. 54, 68 (1943) (concurring):

> A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as legal formula, undiscriminatingly used to express different and sometimes contradictory ideas.

> would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend . . . [R]egulation of the use of the streets for parades and processions is a traditional exercise of control by local government . . .

It thus seems evident that the insurance regulation involved here furthers an important governmental interest, namely, protecting the property in the Village and assuring that any loss will be covered, as well as guarding the safety of both the marchers and the citizens of Skokie.[6]

The third aspect of the *O'Brien* test is the requirement that the "governmental interest is unrelated to the suppression of free expression." This test is clearly met since an interest in the protection of property and the safety of citizens is not related to the expression of opinions. Indeed, this governmental interest exists at all times and merely becomes more difficult to attain during demonstrations and parades. This difficulty, however, is unrelated to the Village's agreement with the ideology being expressed.

Nor can the ordinance be invalidated on the basis of a claim that it was enacted by the Village with the motive to suppress the plaintiffs' freedom of speech. The same argument was made in *O'Brien* and the Court responded, 391 U.S. at 383:

> It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive . . . This fundamental principle of constitutional adjudication was reaffirmed and the many cases were collected by Mr. Justice Brandeis for the Court in *Arizona* v. *California,* 283 U.S. 423, 455 (1931).

I therefore would conclude that the insurance ordinance is designed to further a governmental interest of protecting persons and property which is unrelated to the suppression of free expression.

The final and most challenging part of the *O'Brien* test requires the incidental restrictions on First Amendment rights to be no greater than is essential to further the governmental interest involved. Initially, it must be noted that the amount of insurance required is not extremely large, especially considering that the requirement is only imposed when the demonstrating or assembling group exceeds 50 persons or vehicles. Indeed, the amount required here is less than what many individuals carry in personal automobile insurance. Thus, this facially neutral insurance requirement seems to impose no greater burden than is necessary to achieve the result desired.

Plaintiffs contend, however, that insurance will be difficult or expensive for them to procure and that this fact should somehow invalidate a facially neutral ordinance. They argue that this is an unreasonable burden on their constitutional rights. The district court and the majority here agree, and thus hold that the insurance requirement is unconstitutional.[7] This result seems to follow from no reasonable constitutional analysis.

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[6] Frank McCabe, Village Trustee, gave some of the reasons for the ordinance:

> We felt that we had considerable liability if they came in here and got hurt. We felt that most of the—all of the work that we were doing and the meetings that we had, especially prior to the Fourth of July, all concerned themselves with our responsibility to keep them from getting injured.
>
> The ordinances were directed primarily to give the Village of Skokie better control over many things.
>
> The first ordinance, we had strong concerns over kids that were out, and on weekends, we have a lot of traffic passing through Skokie. Anybody that goes to or from Evanston and wants to get to the Edens Expressway has to go through Skokie. We get busy traffic up and down our streets.
>
> We were looking to protect these people.

McCabe Deposition pp. 26, 29.

We begin with a facially neutral insurance requirement properly within the Village's police powers and designed to protect against loss to the citizens of Skokie. The private insurance market then tells the plaintiffs, in effect, that personal and property damage is so likely to occur when they march that the insurance will be difficult or expensive to obtain. This does not prove that the ordinance is irrational or burdensome; on the contrary, it shows that the insurance requirement furthers a compelling interest of the Village, namely, the protection of its citizens and the avoidance of having its citizens as a whole absorb the cost of damage done by a few. Put another way, the difficulty encountered by the plaintiffs in obtaining insurance coverage fortifies the conclusion that there is justifiable reason to be concerned about damage to property and injury to individuals. Indeed, the gist of the plaintiffs' anomalous argument is that they are such a bad insurance risk that they should be allowed to cause or provoke almost certain damage and to shift the risk to the Village while peaceful groups unlikely to create any problems must furnish the insurance and pay the necessary premiums. Such a conclusion is poor economics and poorer constitutional reasoning.[8]

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[7] Preliminarily, the fact that various other organizations had no difficulty in procuring insurance coverage should have counselled the district court from rushing headlong to invalidate this ordinance. *See* Defendant's Exhibits 3b, 3g and 3n. Obviously, the insurance requirement did not seem to be an unreasonable burden as to these groups.

[8] If the Village had provided for a fixed premium, rather than a fixed coverage, insurance system applicable to all groups regardless of the nature of the group or the type of activity, the ordinance probably would have been challenged on the basis that it did not adequately distinguish between the various groups and therefore imposed an unreasonable and unconstitutional burden on groups which are low insurance risks.

In *Cox* v. *New Hampshire, supra,* the Supreme Court upheld a permit fee ordinance where the fee could vary from a nominal amount up to $300, depending on the public expense of policing the spectacle. There the amount of the fee was to be determined by the municipality, whereas here it is fixed by the competitive market. Even so, the Court found the flexible fee system valid and stated:

> There is nothing contrary to the Constitution in the charge of a fee limited to the purpose stated. The suggestion that a flat fee should have been charged fails to take account of the difficulty of framing a fair schedule to meet all circumstances, and we perceive no constitutional ground for denying to local governments that flexibility of adjustment of fees which in the light of varying conditions would tend to conserve rather than impair the liberty sought.

312 U.S. at 577. That reasoning applies with equal force in the instant case.

I thus would uphold this facially neutral insurance requirement as a clearly constitutional "manner" restriction on First Amendment activities. The Village has a right and a duty to protect its citizens and property in this reasonable manner.

Unfortunately, we did not have an opportunity to observe the ordinance at work in this case. Plaintiffs' application was rejected because they planned to wear military-style uniforms, so that the question of the insurance requirement was not passed on by the Village. Plaintiffs asked the Village in their application either to help them procure insurance or to waive that requirement.[9] In their rush to invalidate this ordinance, however, the district court and the majority did not give the Village an opportunity to determine how the insurance requirements apply, much less to apply them unconstitutionally.

No individual group has as yet been denied the right to march because of the insurance ordinance involved here and several other groups have met the requirement and have paraded in Skokie. The ordinance is reasonable and neutral on its face, is designed to further a compelling governmental interest and has not been applied discriminatorily.[10] This exercise of municipal authority is in no sense an abridgement of First Amendment rights "in the guise of regulation." *Hague* v. *C.I.O.*, 307 U.S. 496, 516 (1939) (opinion of Mr. Justice Roberts, joined by Mr. Justice Black).

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[9] The application letter of June 22, 1977, from plaintiff Frank Collin provided, in part:

> As authorized by § 27-64, we hereby request that the insurance requirement of § 27-54 be waived by the Village of Skokie for the reason that such insurance is not available to the National Socialist Party of America. If the Village of Skokie has retained insurance agents willing to provide the coverage at reasonable cost, or knows where the specified coverage can be obtained, please advise me at once.

Due to the district court's and the majority's dispatch in invalidating wholesale the statutes involved, we do not know what the response of the Village to this request would have been.

It is possible that the Village could use its own business contacts to procure insurance for such an organization at the organization's expense. Alternatively, the Village could agree to allow its own insurance to cover the event and get *pro rata* reimbursement of the premium from the group. Another possibility is the posting of a cash bond to cover damage and injuries and which would be returned if no incidents occurred. If all else failed the requirement could then be waived if necessary to avoid constitutional infirmity.

[10] Other groups have been required to fulfill the insurance requirements. *See* Defendants' Exhibits 3b, 3g and 3n. These requirements have not been waived for any group. Plaintiffs make much of the possibility, however, that the waiver provision of section 27-64 may be applied in the future to waive the insurance requirements discriminatorily. The district court was concerned "because some organizations may be exempted from [the insurance] requirements and there are no principled standards for determining which organizations are exempt." The majority shares this concern. So far, however, no group has been exempted from these require-

[10] (Continued)

ments under the waiver provision, so that a cry of discrimination is certaily pure conjecture. Moreover, insofar as the waiver provision lacks standards and *may possibly* be applied in a discriminatory manner, this alleged vagueness has not as yet had an impact on plaintiffs' rights. Thus, plaintiffs are attacking the ordinance on its face as a representative of all groups who wish to parade. The Supreme Court in *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 60 (1976), however, has made it clear that

> if the statute's deterrent effect on legitimate expression is not "both real and substantial," and if the statute is "readily subject to a narrowing construction by the state courts," see *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 216, the litigant is not permitted to assert the rights of third parties.

I believe this rule applies in the present case.

Plaintiffs (and both the district court and the majority) also make much of alleged "co-sponsoring" of activities by the Village which allegedly is a subterfuge for allowing some organizations to avoid the insurance requirements. The two instances of alleged discriminatory "co-sponsorship" were the Memorial Day and Fourth of July parades, which are traditionally sponsored by municipalities and have been so sponsored by the Village of Skokie for years. Apparently none of the participants in these parades were required to fulfill the insurance requirements, presumably since the Village itself has a public liability policy which would cover any mishaps. Moreover, there is no claim that plaintiffs' group would have been required to obtain insurance in order to participate in these parades. Thus, this "co-sponsorship" discrimination argument seems specious at best and at worst, as here, may lead to the invalidation of an otherwise proper local ordinance. In rushing to protect First Amendment freedoms, we must be cautious so as not to outrun the facts before us. The ordinance should not be struck down on this basis.

III

Up to this point the analysis assumed the validity of two premises. The first is that the activities which plaintiffs proposed to engage in are protected by the First Amendment. The second is that it is impermissible for a government to consider in any way the content of the activities or speech when regulating the time, place or manner in which that activity takes place. A closer examination of each of these assumptions fortifies the conclusion that the insurance ordinance is constitutional not only on its face, but also as applied to the facts of this case.

We must first examine whether plaintiffs' proposed conduct falls within the scope of the First Amendment. We are dealing with a proposed march through a predominantly Jewish community. The plaintiffs would wear nazi-style uniforms and swastika armbands or emblems and carry written signs. No speechs were to be made.[11] Plaintiffs' handbills had been distributed in

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[11] Plaintiffs' Brief p. 4 and Plaintiffs' Exhibit 2. We note that, even assuming that plaintiffs' activities can be found to fall in a class protected by the First Amendment, such activity is not "pure speech" and is thereby properly subject to more concern and regulation by municipalities. As stated by the Supreme Court in *Shuttlesworth* v. *City of Birmingham,* 394 U.S. 147, 152 (1969):

> It is argued, however, that what was involved here was not "pure speech," but the use of public streets and sidewalks, over which a municipality must rightfully exercise a great deal of control in the interest of traffic regulation and public safety. That, of course, is true. We have emphasized before this that "the First and Fourteenth Amendments [do not] afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech." *Cox* v. *Louisiana,* 379 U.S. 536, 555. "Governmental authorities have the duty and responsibility to keep their streets open and available for movement." *Id.* at 554-555.

the Village[12] and a number of Skokie residents with Jewish surnames had received "offensive and threatening telephone calls."[13] The portent of this action and the proposed march could not be lost on anyone familiar with the methods of Hitler's Nazis in Germany.[14]

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[11] (Continued)

Accord, Cox v. *Louisiana,* 379 U.S. 536, 555 (1965). A proper balancing of the public interest with the expression of ideas in this manner therefore must take place. *See United States* v. *O'Brien,* 391 U.S. 367, 377 (1968); *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 572 (1942).

[12] Plaintiffs' Brief p. 3. An example of one of these leaflets, Defendants' Exhibit 9, provides, in part:

> [W]e have decided to relocate in areas heavily populated by the real enemy—the Jews.
>
> An old maxim goes: "Where one finds the most Jews, there also shall one find the most Jewhaters." With this basic truth in mind, we are now planning a number of street demonstrations and even speeches in Evanston, Skokie, Lincolnwood, North Shore, Morton Grove, etc. This leaflet is but the first of a number now being prepared for eventual mass-distribution. A beautiful, full-color poster, 18 inches by 30 inches, with non-removable adhesive on the back, is already in the works. The poster shows three rabbis involved in the ritual murder of an innocent Gentile boy during the hate-fest of Purim.

[13] Plaintiffs' Brief p. 3 Police reports on the complaints to police which followed these calls are produced as Defendants' Exhibits 4A-4V.

[14]
> Hitler summed up the strategy of the mass demonstration as used by both fascism and communism: "We should not work in secret conventicles, but in mighty mass demonstrations, and it is not by dagger and poison or pistol that the road can be cleared for the movement but *by the conquest of the streets.* We must teach [them] that the future *master of the streets* is National Socialism, just as it will some day be the master of the state." (Emphasis supplied.) 1 *Nazi Conspiracy and Aggression* (GPO, 1946) 204,

Under these circumstances, the appearance of plaintiff's group in Skokie may be so extremely offensive and of such little social utility as to be beyond the protection of the First Amendment.[15] In this sense the present case

Under these circumstances, the appearance of plaintiffs' group in Skokie may be so extremely offensive and of such

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[14] (Continued)

> 2 *id.* 140, Docs. 2760-PS, 404-PS, from *"Mein Kampf."* First laughed at as an extravagant figure of speech, the battle for the streets became a tragic reality when an organized *Sturmabteilung* began to give practical effect to its slogan that "possession of the streets is the key to power in the state." *Ibid.,* also Doc. 2168-PS.
>
> The present obstacle to mastery of the streets by either radical or reactionary mob movements is not the opposing minority. It is the authority of local governments which represent the free choice of democratic and law-abiding elements of all shades of opinion, but who, whatever their differences, submit them to free elections which register the results of their free discussion. The fascist and communist groups, on the contrary, resort to these terror tactics to confuse, bully and discredit those freely chosen governments. Violent and noisy shows of strength discourage participation of moderates in discussions so fraught with violence, and real discussion dries up and disappears. And people lose faith in the democratic process when they see public authority flouted and impotent and begin to think the time has come when they must choose sides in a false and terrible dilemma such as was posed as being at hand by the call for the Terminiello meeting: "Christian Nationalism or World Communism—Which?"
>
> This drive by totalitarian groups to undermine the prestige and effectiveness of local democratic governments is advanced whenever either of them can win from this Court a ruling which paralyzes the power of these officials. This is such a case.

Terminiello v. *Chicago,* 337 U.S. 1, 23-24 (1949) (Mr. Justice Jackson, dissenting).

little social utility as to be beyond the protection of the First Amendment.[15] In this sense the present case does not differ greatly from *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942), where the Court upheld the conviction of a Jehovah's Witness for calling complainant a "God damned racketeer" and "a damned fascist." The analysis the Court used there applies with equal force here to the activities proposed by plaintiffs:

> Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include . . . "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed

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[15] It is not clear from Supreme Court opinions exactly what it means to say that such activity is "not protected." On the one hand, it seems to mean that this speech is not treated as speech for First Amendment purposes and therefore First Amendment principles do not apply. *Roth* v. *United States,* 354 U.S. 476, 481-85 (1957); *Miller* v. *California,* 413 U.S. 15, 23-24 (1973). Other cases imply that, although First Amendment principles apply to such speech initially, the fact that the activity falls within certain designated categories (*e.g.,* libel, fighting words) means that there exists a sufficient basis for regulating that speech. *Cohen* v. *California,* 403 U.S. 15, 19-20 (1971); *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 209-10 (1975). Regardless of what it means to say that some activity is "not protected" by the First Amendment, it is clear that the restrictions on government regulation in such circumstances is less stringent.

> by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution. . . ."

Id. at 571-72 (footnotes omitted).

Another basis on which to conclude that plaintiffs' proposed conduct falls outside the protection of the Frst Amendment is that under the circumstances it constitutes a pernicious form of group libel. In *Beauharnais* v. *Illinois*, 343 U.S. 250 (1952), the Court upheld a statute which is strikingly similar to those attacked here. The Court there declared:

> It is not within our competence to confirm or deny claims of social scientists as to the dependence of the individual on the position of his racial or religious group in the community. It would, however, be arrant dogmatism, quite outside the scope of our authority in passing on the powers of a State, for us to deny that the Illinois legislature may warrantably believe that a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits. This being so, we are precluded from saying that speech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups with whose position and esteem in society the affiliated individuals may be inextricably involved.

Id. at 263. Nor do we need to back away from this analysis merely because the Supreme Court has substantially modified the law of libel insofar as it relates to public officials or public figures as opposed to the minor backtracking concerning libel of private individuals. *Compare New York Times Co.* v. *Sullivan,* 376 U.S. 254, 268 (1964) *with Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974). Moreover, although *Beauharnais* is said to have been scarcely noted since 1952, neither has it been overruled.

It appears to me that plaintiffs' proposed activities, under the circumstances presented here, might reasonably be viewed as not within the area of constitutionally protected activity. At least the question seems close enough to warrant serious concern and analysis within the factual situation presented. Plaintiffs' proposed action in this case arguably "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky* v. *New Hampshire, supra,* 315 U.S. at 572. This conclusion supports a finding at the very least of the validity of the challenged insurance ordinance.

IV

Concerning the assumption that the content of speech or conduct is an impermissible consideration when regulation of those activities are proposed, we note that regulation of First Amendment activities never has been and never can be "content blind." As early as 1919, the Supreme Court in *Schenck* v. *United States,* 249 U.S. 47, 52, declared through Mr. Justice Holmes:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

There is no dispute that speech may not be suppressed merely because it offends its listeners. *Cohen* v. *Calfornia,* 403 U.S. 15, 21 (1971). At some point, however, considerations of a neutral desire to maintain the public peace and general welfare come into play in determining whether activities should be allowed. *Feiner* v. *New York,* 340 U.S. 315, 320 (1951). Where the activity is, as here, by its nature and by the circumstances, a threat to a reasonable attempt to maintain the public order, it cannot claim to go unregulated under the auspices that content may not properly be considered.

Such considerations apply with added force where the municipality does not seek to prevent the conduct proposed, but simply proposes to protect against the consequences of such activity. The insurance ordinance at issue here merey attempts to provide this protection. The Village should not be required to ignore the dangers that are presented by plaintiffs' conduct. We noted at the outset that the Supreme Court has recently recognized that "[e]ven within the area of protected speech, a difference in content may require a different governmental response." *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 66 (1977). In my opinion the response of the Village of Skokie in enacting the insurance ordinance was constitutionally permissible.

For the reasons discussed above, I would reverse the decision of the district court declaring the insurance requirement of the ordinance unconstitutional.

APPENDIX C

AN ORDINANCE RELATING TO PARADES AND PUBLIC ASSEMBLIES

WHEREAS, it is in the best interest of the Village of Skokie to provide for the safe and orderly movement of traffic and people so as to protect the residents of the Village of Skokie from disruption of essential services, such as fire protection, program participation, and the orderly pursuit of their activities.

WHEREAS, the President and Board of Trustees are of the opinion that the following regulations are necessary to provide for such purposes in order to promote the health, safety and welfare of the residents of the Village of Skokie;

NOW, THEREFORE, BE IT ORDAINED by the President and Board of Trustees of the Village of Skokie, Cook County, Illinois:

Section 1: That Chapter 27 of the Code of Ordinances of the Village of Skokie be amended by the addition thereto of Article XIII Parades and Public Assemblies, as follows:

Article XIII. PARADES AND PUBLIC ASSEMBLIES

Sec. 27-50. Title. This Ordinance shall be known and may be cited as the "Parade and Public Assemblies Ordinance of the Village of Skokie."

Section 27-51. Permit Required. No parade, public assembly or similar activity, where the number of participants expected may reasonably be assumed to exceed fifty (50) or more persons, and/or vehicles is permitted on any street or area of the Village unless a permit allowing such activity has been obtained from the Village Manager, or upon referral, to the President and Board of Trustees; provided, however, that this Ordinance shall not apply to students going to and from school classes, or participating in educational activities under the immediate direction and supervision of school authorities or a governmental agency acting within the scope of its function, nor shall a permit be required for normal or scheduled activities of the Village.

Sec. 27-52. Application. Any person, partnership, voluntary association, corporation or other organization seeking to obtain a parade or public assembly permit shall file an application with the Village Manager not more than ninety (90) days and not less than thirty days (30) before the date for which the parade, public assembly or similar activity is proposed.

Sec. 27-53. Contents. The application for a parade or public assembly permit shall contain the following information:

a) The name, address and phone number of the person signing the application.

b) If the parade, public assembly, or similar activity is proposed to be conducted for, on behalf of, or by an organization, the name, address, and phone number of the authorized and responsible leaders of the organization conducting the parade or public assembly, and the name, address and telephone number of the headquarters of the organization.

c) The date of the proposed parade or public assembly and the hours that it will commence and terminate.

d) The location of the assembly area and the time when the activity will begin to assemble.

e) The route to be travelled, starting point and the termination point.

f) The approximate number of persons, animals and vehicles to participate in the parade, public assembly, or similar activity.

g) A statement as to whether the parade or public assembly will occupy all or only a portion of the width of the streets proposed to be traversed.

h) The interval of space to be maintained between units of such parade, public assembly or similar activity.

i) If the parade, public assembly or similar activity is designed to be held by and on behalf of, or for any person, partnership, voluntary association, corporation or other organization other than the applicant, the applicant for such permit shall file with the Village of Skokie a communication in writing from such person or from an authorized and responsible leader of such organization authorizing the applicant to apply for the permit on behalf of such person or organization.

j) Any additional information which the Village Manager or President and Board of Trustees shall find reasonably necessary to a fair determination as to whether a permit should be issued.

Sec. 27-54. Insurance Required. No permit shall be issued to any applicant until such applicant procures Public Liability Insurance in an amount of not less than Three Hundred Thousand Dollars ($300,000.00) and Property Damage Insurance of not less than Fifty Thousand Dollars ($50,000.00). Prior to the issuance of the permit, certificates of such insurance must be submitted to the Village Manager for verification that the company issuing such insurance is authorized to do business and write policies of insurance in the State of Illinois.

Sec. 27-55. Late Applicants. The Village Manager or President and Board of Trustees, when good and compelling cause is shown therefor, may consider an application hereunder which is filed less than thirty (30) days before the date such parade, public assembly or similar activity is proposed to be conducted.

Sec. 27-56. Standards for Issuance. The Village Manager or President and Board of Trustees shall issue a permit as provided for hereunder when, from a consideration of the application and from such other information as may otherwise be obtained, it is found that:

a) The conduct of the parade will not substantially interfere with the safe and orderly movement of traffic in the area contiguous to the route.

b) The activity will not create an imminent danger of a substantial breach of the peace, riot, or similar disorder.

c) The conduct of the parade, public assembly, or similar activity will not portray criminality, depravity or lack of virtue in, or incite violence, hatred, abuse or hostility toward a person or group of persons by reason of reference to religious, racial, ethnic, national or regional affiliation.

d) There are available at the time of the parade, public assembly, or similar activity a sufficient number of peace officers to police and protect lawful participants in the activity and maintain adequate police protection in the rest of the Village of Skokie.

e) The concentration of persons, animals and vehicles at the assembly points of the parade, public assembly, or similar activity will not unduly interfere with the proper fire and police protection of, or ambulance service to areas contiguous to such assembly areas.

f) The activity will not interfere with scheduled Village functions or the normal pursuit of activities of the residents of the Village of Skokie.

g) The conduct of such parade, public assembly, or similar activity will not interfere with the movement of fire fighting equipment enroute to a fire.

h) The parade is scheduled to move from its point of origin to its point of termination expeditiously and without unreasonable delays enroute.

i) The parade, public assembly, or similar activity is not being conducted for an unlawful purpose or for the sole purpose of advertising any product, goods or event and is not designed to be held purely for private profit.

j) The applicant has complied fully with the insurance requirements set out in Section 5 of this Ordinance.

Sec. 27-57. Time for Approval or Denial. Following the receipt of an application or re-application, the Village

Manager shall either within ten (10) working days, either issue such permit or deny same. In the event the Village Manager denies the application or re-application, the matter shall be referred to the President and Board of Trustees at a meeting scheduled not more than twenty-one (21) days after the denial of the permit application or at any special meeting of the President and Board of Trustees called for such purpose not more than twenty-one (21) days after the filing of the permit application. In the event the President and Board of Trustees concurs in the Village Manager's denial, the reasons therefor shall be stated and published in the minutes, and the Village Manager shall mail to the applicant within twenty-three (23) days after the date upon which the denial was made a notice of the action of the President and Board of Trustees stating the reasons for the denial of the permit. The action of the President and Board of Trustees shall be subject to judicial review in accordance with the provisions of the Administrative Review Act, Section 264 and subsequent sections of Chapter 110 of the Illinois Revised Statutes of 1975.

Sec. 27-58. Alternative Permit. The Village Manager or President and Board of Trustees in denying a permit application shall be empowered to authorize the conduct of a parade, public assembly, or similar activity on a date, at a time, at a location or over a route different from that named by the applicant. An applicant desiring to accept an alternate permit shall within two (2) days after notice of the action by the Village Manager and Board of Trustees file a written notice of acceptance with the Village Manager. An alternate permit shall conform to the requirements of and shall have the effect of a parade or public assembly permit.

Sec. 27-59. Notice to Officials. Immediately upon the issuance of a parade or public assembly permit, the Village Manager shall send a copy thereof to the following:

a) The Police Chief of the Village of Skokie.

b) The Fire Chief of the Village of Skokie.

c) The Corporation Counsel of the Village of Skokie.

Sec. 27-60. Contents of Permit. Each parade or public assembly permit shall state the following information:

a) Starting time.
b) Minimum speed.
c) Maximum speed.
d) Maximum interval of space to be maintained between the units of the parade or public assembly.
e) The portions of the streets to be traversed that may be occupied by the parade or public assembly.
f) The maximum length of the parade or public assembly in miles or fractions thereof.
g) Such other information as the Village Manager and Board of Trustees shall find necessary to insure the enforcement of this Ordinance.

Sec. 27-61. Duties of Permitee. A permittee hereunder shall comply with all permit directions and conditions and with all applicable laws and ordinances. One of the authorized and responsible leaders of the organization conducting the parade, public assembly, or similar activity, shall carry the parade or public assembly permit upon his person during the conduct of the parade.

Sec. 27-62. Public Conduct During Parades, Public Assemblies or Similar Activities:

a) Interference. No person shall unreasonably hamper, obstruct, impede or interfere with any parade, public assembly or similar activity, or with any person, vehicle or animal participating or used in such activity.

b) Driving Through Parades, Public Assemblies, or Similar Activities. No driver of any vehicle shall drive between the vehicles or persons comprising a parade, public assembly, or similar activity when such vehicles or persons are in motion and are conspicuously designated as a parade, public assembly, or similar activity; provided, however, that Fire and Police vehicles and ambulances may interrupt a parade, public assembly, or similar activity in an emergency situation.

c) Parking on Parade or Public Assembly Route. The Village Manager or President and Board of Trustees shall have the authority to prohibit or restrict the parking of vehicles along a highway or part thereof constituting a part of the route of a parade, public assembly, or similar activity. The Village Manager or President and Board of Trustees shall order the posting of signs to such effect and it shall be unlawful for any person to park or leave unattended any vehicle in violation thereof. No person shall be liable for parking on a street unposted in violation of this Ordinance.

Sec. 27-63. Revocation of Permit. The Village Manager or President and Board of Trustees shall have the authority to revoke a parade or public assembly permit issued hereunder if, at any time, facts are brought to the attention of the Village Manager or President and Board of Trustees which show that the parade, public assembly, or similar activity does not, or will not, comply with the standards for issuance as herein set forth.

Sec. 27-64. Waiver of Provisions. The President and Board of Trustees may, with the consent of all members of the Board present at any meeting thereof, waive any provision of this ordinance.

Sec. 27-65. Penalties. Any person who knowingly interferes with any person or organization lawfully conducting a parade or public assembly, or any person violating any of the provisions of this Ordinance shall be fined not less than Five Dollars ($5.00) nor more than Five Hundred Dollars ($500.00) for each offense.

Sec. 27-66. Separability. If any provision contained in this Ordinance is found to be invalid, such provision shall be deemed to be separable and shall not affect the validity of any of the remaining provisions of this Ordinance.

Sec. 27-67. Ordinance Repealed. All ordinances or provisions of ordinances in conflict with this Ordinance or any of the provisions of this Ordinance, are hereby repealed to the extent that they conflict with this Ordinance or any provision of this Ordinance.

Section 2: This Ordinance shall be in full force and effect from and after its passage, approval and publication, as required by law.

Adopted this 2nd day of May, 1977.

William Siegel

....

Village Clerk

Ayes—7
Nays—0
Absent—0

Approved by me this 2nd day of May, 1977.

....

President, Village of Skokie

Attested and filed in my
office this 3rd day of May,
1977; and published as required
by law this .... day of
......................., 1977.
William Siegel

....

Village Clerk

APPENDIX D

AN ORDINANCE PROHIBITING THE DISSEMINATION OF MATERIALS WHICH PROMOTE AND INCITE GROUP HATRED

Whereas, the dissemination of any material within the Village of Skokie which promotes and incites hatred against members of any group by reason of their race or national ancestry is repugnant to the local standards of morality of the people of the Village of Skokie.

Now, Therefore, It Is Hereby Ordained:

Section 1: That Chapter 28 of the Code of Ordinances of the Village of Skokie be amended by the addition thereto of Section 28-43, as follows:

Sec. 28-43 Prohibition of materials promoting or inciting group hatred.

Sec. 28-43.1 The dissemination of any materials within the Village of Skokie which promotes and incites hatred against persons by reason of their race, national origin, or religion, and is intended to do so, is hereby prohibited.

Sec. 28-43.2 The phrase "dissemination of materials" includes but is not limited to publication or display or distribution of posters, signs, handbills, or writing and public display of markings and clothing of symbolic significance.

Sec. 28-43.3 The Corporation Counsel of Skokie is hereby empowered to seek an injunction in the Circuit Court of Cook County to restrain any person, group or organization from violating this ordinance.

Sec. 28-43.4 Any violation of this ordinance shall be deemed to be a misdemeanor and upon conviction thereof, any person found guilty shall be punished by a fine of not more than $500.00, or by imprisonment in the County Jail for not more than six (6) months, or by any combination of the foregoing for each offense.

Sec. 28-43.5 The invalidity of any section or part of this ordinance shall not affect the validity of the remaining sections or parts.

Section 2: This ordinance shall be in full force and effect from and after its passage, approval and publication as provided by law.

Adopted this 2nd day of May, 1977.

William Siegel

....

Village Clerk

Ayes—7
Nays—0
Absent—0

Approved by me this 2nd day of May, 1977.
Albert Smith
President, Village of Skokie

Attested and filed in my office this
3rd day of May, 1977; and published
as provided by law this ....
day of ...., 1977.
William Siegel

....

Village Clerk

APPENDIX E

AN ORDINANCE PROHIBITING DEMONSTRATIONS BY MEMBERS OF POLITICAL PARTIES WEARING MILITARY-STYLE UNIFORMS

Whereas, public demonstration by members of political parties wearing military-style uniforms is repugnant to the tradition of civilian control of government and is repugnant to the standards of morality and decency of the people of the Village of Skokie;

Now, Therefore, It Is Hereby Ordained that Chapter 28 of the Code of Ordinances of the Village of Skokie be amended by the addition thereto of Section 28-42, as follows:

Sec. 28-42 Prohibition of demonstrations by members of political parties wearing military-style uniforms.

Sec. 28-42.1 No person shall engage in any march, walk or public demonstration as a member or on behalf of any political party while wearing a military-style uniform.

Sec. 28-42.2 "Political party" is hereby defined as an organization existing primarily to influence and deal with the structure or affairs of government, politics or the state.

Sec. 28-42.3 The Corporation Counsel of Skokie is hereby empowered to seek an injunction in the Circuit Court of Cook County to restrain any person, group or organization from violating this ordinance.

Sec. 28-42.4 Any violation of this ordinance shall be deemed to be a misdemeanor and upon conviction thereof, any person found guilty shall be punished by a fine of not more than $500.00, or by imprisonment in the County Jail for not more than six (6) months, or by any combination of the foregoing for each offense.

Sec. 28-42.5 The invalidity of any section or part of this ordinance shall not affect the validity of the remaining sections or parts.

This Ordinance shall be in full force and effect from and after its passage, approval and publication, as required by law.

Adopted this 2nd day of May, 1977.

William Siegel

....

Village Clerk

Ayes—7
Nayes—0
Absent—0

Approved by me this 2nd day of
May, 1977.
Albert Smith
President, Village of Skokie

Attested and filed in my
office this 3rd day of May,
1977; and published as required
by law this .... day of
................................., 1977.
William Siegel
....
Village Clerk

Supreme Court, U.S.
FILED
AUG 11 1978
MICHAEL RODAK, JR., CLERK

No. 77-1736 (A-1037)

In the Supreme Court of the United States

OCTOBER TERM, 1977

ALBERT SMITH, President of the Village of Skokie, Illinois; JOHN N. MATZER, JR., Village Manager of the Village of Skokie, Illinois; HARVEY SCHWARTZ, Corporation Counsel of the Village of Skokie, Illinois; and the VILLAGE OF SKOKIE, Illinois, a municipal corporation,
Petitioners,

vs.

FRANK COLLIN and the NATIONAL SOCIALIST PARTY OF AMERICA,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

PAGE

OPINIONS BELOW 2
QUESTION PRESENTED 2
REASONS FOR REFUSING CERTIORARI 3
PROCEDURAL HISTORY 3
STATEMENT OF FACTS 4
- A. The Parties 4
- B. The Permit Application 5
- C. The Ordinances 7
- D. Petitioners' Opinion Testimony 8

ARGUMENT SUPPORTING REASONS FOR DENYING CERTIORARI 9
- A. Overbreadth and Vagueness 9
- B. *Beauharnais* v. *Illinois* 13
- C. Petitioners' Other Arguments 15

CONCLUSION 19

Cases Cited

Bachellar v. Maryland, 397 U.S. 611 (1971) 10

Beauharnais v. Illinois, 343 U.S. 250 (1952) 3, 13, 14

Blonder-Tongue Labs., Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) 15

Brandenburg v. Ohio, 395 U.S. 444 (1969) 14, 17

Broadrick v. Oklahoma, 413 U.S. 601 (1972) 11

PAGE

Cantrell v. Connecticut, 310 U.S. 296 (1940) 14

Chicago Real Estate Board v. City of Chicago, 36 Ill. 2d 530 (1967) 16

Cline v. Frink Dairy Co., 274 U.S. 445 (1927) 12

Coates v. City of Cincinnati, 402 U.S. 611 (1971) 10, 13

Cohen v. California, 403 U.S. 15 (1971) 14

Contreras v. Crown Zellerback Corp., 565 P.2d 1173 (1977) 16

Gooding v. Wilson, 405 U.S. 518 (1972) 10

Keyishian v. Board of Regents of New York, 385 U.S. 589 (1966) 12

Lanzetta v. New Jersey, 306 U.S. 451 (1939) 12

NAACP v. Button, 371 U.S. 415 (1963) 13

National Socialist Party of America v. Village of Skokie, 423 U.S. 43 (1977) 3

Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973) 16

Smith v. Goguen, 415 U.S. 566 (1973) 13

Street v. New York, 395 U.S. 576 (1969) 10

Village of Skokie v. National Socialist Party of America, 51 Ill. App. 3d 279 (1977) 3

Village of Skokie v. National Socialist Party of America, 69 Ill. 2d 605 (1978) 3, 15, 18

Winters v. New York, 333 U.S. 507 (1948) 12

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondents pray that the requested Writ of Certiorari not issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on May 22, 1978, which affirmed the judgment of the United States District Court for the Northern District of Illinois, entered on February 23, 1978.

OPINIONS BELOW

The Petition for Writ of Certiorari is filed from the decision of the Circuit Court of Appeals for the Seventh Circuit, set forth in Petitioners' Appendix B. That decision affirmed the ruling of the District Court, set forth in Petitioners' Appendix A.

QUESTION PRESENTED

Whether the Seventh Circuit Court of Appeals was correct in affirming the judgment of the District Court that certain provisions of three ordinances of the Village of Skokie, which prohibited approximately 50 uniformed members of the National Socialist Party of America from holding a public assembly in front of the Skokie Village Hall where no speeches would be made or literature distributed, and in which signs would display the swastika and would state "Free Speech for White People," and the like, violated the First Amendment to the United States Constitution?

REASONS FOR REFUSING CERTIORARI

A. The Court of Appeals for the Seventh Circuit was correct in its judgment that the ordinances in question are unconstitutional because they violate the First Amendment.

B. The Court below distinguished the decision in this case from the decision in *Beauharnais* v. *Illinois* and did not, as petitioners suggest, issue an opinion overruling *Beauharnais*.

C. The demonstration by respondents in Skokie, which gave rise to this dispute, was cancelled with alternate peaceable assemblies being held at locations in the City of Chicago, Illinois.

PROCEDURAL HISTORY

During the month of March, 1977, respondents Frank Collin and the National Socialist Party of America announced plans to hold a public assembly in front of the Village Hall in Skokie, Illinois, on May 1, 1977. Village officials responded by obtaining, in state court, a preliminary injunction against the demonstration. After state courts refused to stay the injunction pending appeal, the United States Supreme Court ordered an immediate appellate review or a stay of the injunction. *National Socialist Party of America* v. *Village of Skokie*, 423 U.S. 43 (1977). The injunction was subsequently reversed: first in part, *Village of Skokie* v. *National Socialist Party of America*, 51 Ill. App. 3d 279, 366 N.E. 2d 347 (1977); and then in its entirety, *Village of Skokie* v. *National Socialist Party of America*, 69 Ill. 2d 605 (1978). No appeal was sought in this Court.

On May 2, 1977, the Village enacted three ordinances to prohibit demonstrations such as the one Collin and the

National Socialist Party of America had planned. On August 13, 1977, respondents filed the present case in the United States District Court, challenging the relevant provisions of Skokie's new ordinances. On February 23, 1978, the Honorable Bernard M. Decker, district judge, ruled that the ordinances were facially unconstitutional. On May 22, 1978, the Seventh Circuit Court of Appeals affirmed that ruling. On June 12, 1978, this Court denied a stay of that ruling, thus refusing to bar respondents' public assembly. A short time later, respondents voluntarily shifted the assembly from the Village of Skokie to the City of Chicago where peaceable public assemblies were held on June 24 and July 9, 1978.

STATEMENT OF FACTS

Believing that the Statement of Facts set out by petitioners is insufficient, respondents rely upon the principal facts which were found and set forth in the opinion of the District Court below:*

A. The Parties

Skokie is a municipal corporation, north of Chicago, which is generally regarded in the Chicago area as a predominantly Jewish community. In fact, as of 1974, the Jewish population was 40,500 out of a total population of 70,000. Under the Illinois Constitution, Skokie is a home-rule unit and, as such, has plenary legislative authority to enact ordinances for the protection of the public welfare within its borders. Ill. Const., Art. VII, §6(a). (Appendix 1a-2a)

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* When a citation to the District Court's opinion appears in the Statement of Facts, the language is taken *verbatim* from that opinion. Other references will refer to evidence appearing in the record and will be cited accordingly.

Respondent Collin testified that the National Socialist Party of America is "a Nazi organization," and that in public appearances its members wear uniforms reminiscent of those worn by members of the German Nazi Party during the rule of the Third Reich. Specifically, respondents employ the swastika as a party symbol. Among their more controversial political views, respondents believe that black persons are "biologically inferior" to whites and should be "expatriated" to Africa, and that American Jews have excessive influence in government and close ties to international communism. Collin stated that this Jewish influence should be "exposed and documented and presented to the American public," but denied that plaintiffs endorse the Third Reich's "final solution" to the problem of Jewish influence—genocide. (Appendix 2a)

B. The Permit Application

In late 1976 respondents planned a series of demonstrations in Jewish communities, including Skokie. According to respondents' publications, this campaign was based on the belief that Jews are responsible for busing and racial integration in the Chicago school system, which respondents have been protesting in other parts of the Chicago area. Respondents were denied permission to demonstrate in a Skokie park because of a Skokie Park District ordinance which required them to obtain $350,000 in liability and property insurance. (Appendix 2a)

Respondents then planned a demonstration in the Village of Skokie to protest the Park District ordinance. The demonstration was scheduled for May 1, 1977. On March 20, Collin notified Skokie Police Chief Kenneth Chamberlain of respondents' plans and assured him that the demonstration would be brief, peaceable and orderly. News of the planned demonstration caused considerable consternation in Skokie. The situation was exacerbated by the appearance of some of respondents' handbills within the Village and by a rash of offensive and threatening telephone calls to Skokie residents with Jewish surnames. Although there is no evidence that respondents were responsible for these calls, they undoubtedly stirred public sentiment against the proposed demonstration.* As a result of this sentiment, the Village decided to attempt to prevent the demonstration. On April 29, 1977, a preliminary injunction against the demonstration was obtained in state court (later vacated). On May 2, 1977, the Village enacted the three ordinances at issue in this action. (Appendix 3a).

On June 22, 1977, Collin applied for a permit under Ordinance #994 which requires, *inter alia,* procurement of $350,000 liability and property damage insurance as a prerequisite for any permit. The application recited that the proposed public assembly would take place on July 4, 1977, would last about a half hour, and would not disrupt traffic.** It stated further that the participants would wear uniforms including swastikas and carry placards carrying statements such as "White Free Speech," "Free Speech for the White Man," and "Free Speech for White Americans," but would not distribute handbills or literature. The evidence shows that the location selected for the parade was in a commercial, rather than residential, area of Skokie. Finally, the applicants stated that they could

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* Defendants did not suggest that plaintiffs were responsible for the calls and the reporting officer on one of the police reports admitted into evidence expressed the opinion that it was doubtful that plaintiffs were responsible. (Appendix 3a.) (This footnote is from the District Court's opinion.)

** The demonstrators were to march in single file, back and forth, in front of the Village Hall; no speeches were to be made. (App. 3a-4a.)

not obtain the required insurance and requested that the Village either waive the requirement or assist applicants in finding an insurer. Respondents' application was denied by petitioner John Matzer, Jr., the Village Manager, on grounds that the respondents planned to wear military-style uniforms in violation of Ordinance #996. (Appendix 3a-4a)*

C. The Ordinances

Ordinance #994 is a comprehensive permit system for all parades or public assemblies of more than 50 persons anywhere within Skokie. It requires all permit applicants to obtain $300,000 in liability insurance and $50,000 in property damage insurance. Ordinances #995 and #996 are both criminal measures: #995 prohibits the dissemination of material which incites racial or religious hatred, with intent to incite such hatred; #996 prohibits public demonstrations by members of political parties while wearing military-style uniforms. These ordinances are also enforced through the permit mechanism of #994. A specific provision of that ordinance, §27-56(c), requires that a permit be denied to public assemblies which will engage in the activity prohibited by #995 and a catch-all provision relating to assemblies organized for unlawful purposes, §27-46(j), serves the same function for #996. (Appendix 3a)**

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* On April 11, 1978, respondents submitted a renewed permit application to the petitioners by registered mail, seeking issuance of a permit for June 25, 1978. As previously noted, that assembly was subsequently held at a site in the City of Chicago, Illinois.

** The Court found that "the wording of the ordinances and the context in which they were enacted leave no doubt that they were intended to cover demonstrations by Nazi organizations." (Appendix 5a-6a). The court further characterized its finding as one of legislative intent.

D. Petitioner's Opinion Testimony

The petitioners presented evidence to support their claim that mental and emotional trauma can be caused by "racial slurs." (The District Court's opinion used the term "racial slurs" to generally characterize some of the speech prohibited by Ordinance #995 and §27-56(c) of #994.) (Appendix 13a-14a)

The Court summarized the testimony as follows:

> Prof. David Gutmann, Chief of Psychology Division at Northwestern University, testified in detail on the psychological effect of racial slurs on members of groups, such as blacks and Jews, that have been the victims of prejudice and oppression. Defendants also presented the opinion that the mere presence of plaintiffs in Skokie would have a severe harmful effect on Jewish survivors of World War II, but it is apparent that his views on this point are colored by his own interpretation of free speech and by his strong opposition to plaintiffs' political views. (Appendix 28a, n.11)

In addition to Professor Gutmann's testimony, the Court heard a variety of views, in support of the ordinances, from Japanese, Polish, Jewish and Latino individuals.

Referring to racial slurs directed at large groups, the Court made no finding as to the existence of psychological harm but specifically noted that:

> . . . the psychological trauma which they may cause is much more difficult to identify and prove than damage to reputation. It is particularly difficult to distinguish a person who suffers actual psychological trauma from one who is only highly offended. (Appendix 36a)

ARGUMENT SUPPORTING REASONS FOR DENYING CERTIORARI

The Petition for Certiorari should be denied in this case because the ruling below is correctly grounded on previous decisions of this Court which compelled the Courts below to hold the ordinances unconstitutional.

A. Overbreadth and Vagueness

The ruling of the courts below holding that Skokie's ordinances banning communications which are offensive to racial, religious and ethnic groups were unconstitutionally overbroad was correct. Ordinance #995 (Appendix 98a) punishes "dissemination of any materials" which "promotes and incites hatred" . . . "by reason of . . . race, national origin, or religion." Dissemination includes "display of markings and clothing of symbolic significance." Ordinance #994 (Appendix 91a) prohibits permits for assemblies which, *inter alia,* portray "lack of virtue" in others or "incite . . . hostility" towards others "by reason of reference to religious, racial, ethnic, national or regional affiliation." These words sweep far beyond any constitutionally permissible limit prohibiting the peaceable picketing planned by respondents.*

The ruling of the Seventh Circuit invalidating Ordinance #995 is summarized by the following statement of Judge Wilbur Pell:

> We conclude that 995 may not be applied to criminalize the conduct of the proposed demonstration. Because it is susceptible to such an application, we also conclude that it suffers from substantial overbreadth,

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* The Village conceded below that Ordinance #996, prohibiting wearing of military-style uniforms is unconstitutional.

> even if some of the purpose 995 is said to serve might constitutionally be protectible by an appropriate and narrower ordinance. (Appendix 65a)

Judge Pell reached the same conclusion with respect to the analogous section of Ordinance #994. (Appendix 65a-66a)

The authority which supports the rulings of the Seventh Circuit and the District Court is unequivocal.

The Supreme Court has recognized the chilling effect of comparable ordinances and has repeatedly struck them down. In *Gooding* v. *Wilson*, 405 U.S. 518 (1972), for example, the Court declared unconstitutional a Georgia statute making it a misdemeanor to use to another "opprobrious words or abusive language tending to cause a breach of the peace," on the ground that it was insufficiently narrow:

> Persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression. 405 U.S., at 521.

Thus, it is settled law that a statute which might be read to prohibit legitimate speech becomes, in fact, an unlawful interference with First Amendment guarantees. See also *Street* v. *New York*, 395 U.S. 576 (1969); *Bachellar* v. *Maryland*, 397 U.S. 288 (1964). The present Skokie ordinances are, if anything, even more offensive than those which the Supreme Court previously refused to uphold. See also *Coates* v. *City of Cincinnati*, 402 U.S. 611, 615 (1971).

In an effort to draw attention away from the enormously broad reach of their ordinances, petitioners suggest that

the ordinances are limited to a prohibition of "inciting group hatred." However the ordinances, in fact, prohibit a great deal more. They seek to prohibit language which "portray[s] . . . lack of virtue . . . incite[s] violence, hatred, abuse or hostility . . . promotes and incites hatred . . ." (§27-54c, Appendix 94a; §§28-43.1 and 28-43.2, Appendix 99a)

In *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1972), moreover, this Court reaffirmed the validity of the overbreadth doctrine as applied to prohibitions on the expression of ideas. In upholding the particular statute which was attacked in *Broadrick* as being overbroad, the Court emphasized that the statute was not directed at "particular groups or viewpoints." 413 U.S., at 616. The District Court here found, by contrast, that the Skokie ordinances were directed at a particular viewpoint. (Appendix 5a, 6a)

Moreover, a strained reading of the ordinances is not required to conclude that not only much political rhetoric but also many literary works as well could be prohibited under their terms. As the Court of Appeals noted, the ordinances

> could conceivably be applied to criminalize dissemination of *The Merchant of Venice* or a vigorous discussion of the merits of reverse racial discrimination in Skokie. (Appendix 65a)

In addition, punishment under #994 and #995 for "dissemination of materials" which promotes and incites hatred, hostility or portray "lack of virtue" . . . "by reason of reference to religious, racial, ethnic, national, or regional affiliation . . ." would impose criminal sanctions pursuant to laws that give no clear warning of what is forbidden and are, therefore, unconstitutionally vague.

It is well settled that a law which does not clearly define the behavior prohibited violates the due process clause of the Fourteenth Amendment. *Cline* v. *Frink Dairy Co.*, 274 U.S. 445 (1927); *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939). The requirement of clarity is particularly important where the law has a potentially inhibiting effect on speech. *Winters* v. *New York*, 333 U.S. 507 (1948).

In *Winters* v. *New York*, *supra*, the Court struck down as vague a statute which made it a crime to issue a publication in which stories of "bloodshed and lust" were so "massed" as to become "vehicles for inciting violent and depraved crimes against the person." 333 U.S., at 513. The Court expressly referred to the fundamental unfairness of such a statute in holding it unconstitutional:

> [A]n honest distributor of publications could [not] know when he might be held to have ignored such a prohibition. Collections of tales of war horrors, otherwise unexceptionable, might be found to be "massed" so as to become "vehicles for exciting violent and depraved crimes." Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained. 333 U.S., at 520.

The similarity in lack of clarity between the concepts of "inciting violent and depraved crimes" and the language in #995 and #994 is obvious. Even ignoring the numerous verbal ambiguities in the Skokie ordinances, the behavior sought to be prohibited is so ill-defined that no one attempting to exercise his right to political expression could reasonably be expected to know how to legally do so. And the Supreme Court, recognizing the danger to freedom that lurks in vague statutes restricting First Amendment freedoms, has repeatedly declared such statutes unconstitutional. See e.g., *Keyishian* v. *Board of Regents of New York*, 385 U.S. 589 (1966); *Smith* v. *Goguen*, 415 U.S. 566 (1973); *Coates* v. *City of Cincinnati*, *supra*. As the Court stated in *NAACP* v. *Button*, 371 U.S. 415 (1963):

> Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms. 371 U.S., at 438.

B. Beauharnais v. Illinois

The petitioners' contention that the ruling below overrules the decision of *Beauharnais* v. *Illinois*, 343 U.S. 250 (1952), simply is not correct. The Skokie brief filed with this Court fails to address the Court of Appeals' treatment of the *Beauharnais* case and fails to identify any specific legal error which the Village challenges. Mere repetition of a different statute upheld in 1952 does not adequately defend their ordinances. (Petition for Cert, pp. 15-16.) In fact, the Seventh Circuit made clear that the majority ruling was based on the doctrine of overbreadth and did not overrule *Beauharnais.*

> In our opinion *Beauharnais* does not support ordinance 995, for two independent reasons. First, the rationale of that decision turns quite plainly on the strong tendency of the prohibited utterances to cause violence and disorder. The Illinois Supreme Court had so limited the statute's application, as the United States Supreme Court noted. *Id.*, at 254. The latter Court also pointed out that the tendency to induce breach of the peace was the traditional justification for the criminal libel laws which had always been thought to be immune from the First Amendment. *Id.* After stating the issue (whether Illinois could extend criminal libel to groups) the Court turned to Illinois' history of racial strife "and its frequent obligato of extreme racial and religious propagnda,"

id. at 261, and concluded that the Illinois legislature could reasonably connect the strife and the propaganda and criminalize the latter to prevent the former. *Cantrell* v. *Connecticut,* 310 U. S. 296, 310 (1940), was quoted, at 261:

> The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit *would incite violence and breaches of the peace* in order to deprive others of their equal right to the exercise of their liberties,* is emphasized by events familiar to all. These and other transgressions of [the limits to First Amendment rights] the States appropriately may punish. [Emphasis added.]

It may be questioned, after cases such as *Cohen* v. *California, supra; Gooding* v. *Wilson, supra;* and *Brandenburg* v. *Ohio, supra,* whether the *tendency to induce violence* approach sanctioned implicitly in *Beauharnais* would pass constitutional muster today. Assuming that it would, however, it does not support ordinance 995 because the Village, as we have indicated, does not assert appellees' possible violence, an audience's possible responsive violence, or possible violence against third parties by those incited by appellees, as justifications for 995. Ordinance 995 would apparently be applied in the absence of any such threat. The rationale of *Beauharnais,* then, simply does not apply here. [Emphasis in original.]

Further, when considering the application of *Beauharnais* to the present litigation, we cannot be unmindful of the "package" aspects of the ordinances and that the "insulting" words are to be made public only after a 30-day permit application waiting period. Violence occurring under such a circumstance would have such indicia of premeditation as to seem inconsistent with calling into play any remaining vitality of the *Beauharnais* rationale. (Appendix 59a-60a)

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* The Seventh Circuit's footnote 13 is omitted. (Appendix 60a)

Moreover, as the Seventh Circuit recognized, the proposed speech and assembly at issue here are protected by the First Amendment. (Appendix 5a) Thus, Skokie's ordinances are unconstitutionally applied to assemblies like those planned by respondents. In using the ordinances to deny respondents or others a permit to assemble because of their party symbols or military-style uniforms, petitioners were acting in an unconstitutional manner which is not compelled by these "group libel" ordinances.

Respondents' assembly was to consist of a number of uniformed individuals picketing silently in front of the Skokie Village Hall for a half hour. Their signs were to state: "Free Speech for White People," and "White Free Speech" in protest of the ordinance which prevented them from assembling in Skokie in the first place.

The sole communication that petitioners objected to in judicial proceedings is the display of the military-style uniforms and the swastika which were to be displayed on their picket signs and uniforms. In litigation between the same parties arising out of the same events which gave rise to this case, display of both the uniforms and the swastikas has been upheld by the Illinois courts as protected by the First Amendment. See *Village of Skokie* v. *National Socialist Party of America,* 69 Ill. 2d 605 (1978). In short, the communications at issue here do not fall into the category of communications which could be lawfully prohibited by Skokie's ordinances. Cf. *Blonder-Tongue Labs., Inc.* v. *University of Illinois Foundation,* 402 U.S. 313 (1971).

C. Petitioners' Other Arguments

Petitioners' other arguments also emphasize the notion that there is precedent to support the assertion that Ordinances #995 and #994 are valid protections of Skokie's residents against the psychic trauma and discrimination which respondents' ideas assertedly will cause. (Petition, pp. 17-24) For example, they cite *Contreras* v. *Crown Zellerbach Corp.*, 88 Wash. 2d 735, 565 P.2d 1173 (1977), which upheld a tort action by a Mexican worker against his employer for use of derogatory racial epithets directed personally at the worker on the job. The case does not, of course, save the Skokie ordinances from their vagueness and overbreadth. Moreover, the interpersonal communication there is quite different from the political demonstration which is the subject of this litigation. Petitioners' reliance on *Chicago Real Estate Board* v. *City of Chicago*, 36 Ill. 2d 530 (1967) upholding bans on "panic peddling" and "block busting" real estate tactics is similarly misplaced. Regulation of commercial speech is not subject to the exact same First Amendment strictures as is political communication. See *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U. S. 376, 385-386 (1973). In short, their tort law "trauma" argument has no basis in law as justification for censorship of political communication.

The Village of Skokie also persists in its contention that these ordinances may constitutionally be used to bar "intentionally false and defamatory" statements, suggesting that the Court of Appeals has somehow placed its seal of approval upon public calls to genocide. (Petition, p. 26) Thus, in this Court, as below, petitioners have argued the right of the Village to ban through these ordinances, the "direct racial or ethnic lie" (Petition, p. 28) and the "false and defamatory implication of evil to persons by reason of their parentage." (*Id.*, at 29) Considering this contention against a record showing a proposed public assembly in front of a village hall, without speeches and without distribution of handbills, the Court of Appeals held that application of these ordinances to that situation could not be limited to statements of fact—false or otherwise. "To the degree that the symbols in question [uniforms and swastikas] can be said to assert anything specific, it must be the Nazi ideology, which cannot be treated as a mere false 'fact'." (Appendix 57a-58a) Further, the Court concluded, "The asserted falseness of Nazi dogma and, indeed, its general repudiation, simply do not justify its suppression." (Appendix 58a)

In addition, petitioners attempt to avoid their admission made before both the District Court and the Court of Appeals that "The Village *does not* contend that the forbidden conduct [speech which intentionally incites racial hatred] will create a clear and present danger of violence, riot, breach of peace, or other disorders." (Appendix 19a, Emphasis in original.) This position was maintained in the Court of Appeals. (Appendix 56a-57a); nonetheless, petitioners now suggest for the first time in these proceedings that the proposed assembly at the Village Hall would, in fact, have been an intentional incitement to riot and a deliberate provocation outside the protection of the First Amendment. (Petition, at 31) There is no support in the record for their changed position and their admission remains to the contrary. Moreover, petitioners' argument appears to be that a silent assembly at the Village Hall, attended by signs and symbols, would constitute *per se* group defamation, infliction of emotional distress, and deliberate incitement to riot. Such contentions do not meet the rigorous requirements of this Court's decision in *Brandenburg,* which must be complied with before speech may be suppressed as incitement to riot. *Brandenburg* v.

Ohio, 395 U. S. 444 (1969). This position was also rejected by the Illinois Supreme Court in *Village of Skokie* v. *National Socialist Party of America, supra.,* which petitioners have neither cited nor appealed to this Court.

Finally, petitioners have argued what amounts to a defense of their attempt to impose a prior restraint on the proposed demonstration. This argument is inappropriate for two reasons. First, as already noted, the demonstration was moved to a site in Chicago; and second, their contention that the proposed assembly could be barred has been considered and rejected by the Illinois Supreme Court. That Court explicitly held:

> . . . as we read the controlling Supreme Court opinions, use of the swastika is a symbolic form of free speech entitled to first amendment protections. Its display on uniforms or banners by those engaged in peaceful demonstrations cannot be totally precluded solely because that display may provoke a violent reaction by those who view it. Particularly is this true where, as here, there has been advance notice by the demonstrators of their plans so that they have become as the complaint alleges, "common knowledge" and those to whom sight of the swastika banner or uniforms would be offensive are forewarned and need not view them. A speaker who gives prior notice of his message has not compelled a confrontation with those who voluntarily listen. *Village of Skokie* v. *National Socialist Party of America, supra,* at 618.

As previously pointed out, petitioners did not seek review of that decision in this Court; therefore, they should not be accorded an opportunity to collaterally attack that ruling in this case.

CONCLUSION

For the foregoing reasons the respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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